06-122

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MIKE H. SAMADI,

Petitioner

v.

MBNA AMERICA, INC.

Respondent

On Petition For Writ of Certiorari

To The (United States Court of Appeals for Eleventh Circuit

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Questions before the United States Supreme Court

Preface

The issues before this Honorable Court arise from a verbal Credit Card agreement which was entered into in 1996 in the state of Georgia between Petitioner ("Samadi") and the Respondent's ("MBNA").

In April 2003, Samadi was detained beyond his control (for a noncriminal matter). In early May 2003, while in detention, Samadi forwarded a letter to MBNA compelling and explaining his status while requesting an extension until he returns from his hardship. MBNA did not reply. The MBNA's account was not paid regularly (through some auto payment method); because the company did not offer insurance protection nor alternative payment method in which the monthly payments would automatically be covered through one of Samadi's funds account. Three or four months after the account was announced to be in default, MBNA without any formal demand, collection attempts or any alternative actions to secure communications or payments (**as all creditors and bill collectors do**), sold the account at a fraction of face value to what it claimed to be an outside collection agency and wrote the account off. Therefore, Samadi filed the complaint in the District Court for Southern District of Georgia, Augusta Division.

The complaint accused MBNA and its collection agencies on a series of violations of **Fair Debt Collection Practice Act** (15 U.S.C. §1692) "FDCPA" §§ 801 thru 818, 12 C.F.R. § 226.4, Consumer Credit Protection Act (15 U.S.C. § 1601 et seq.), Fair Credit Reporting Act hereafter "FCRA", 15 U.S.C. § 1681 et seq., FCRA Sections 601 thru 625; as well as, the Georgia Fair Credit Extension Act and Consumer Credit Protection Act (CCPA) Public Law 90-321, 82 Stat. 146, et seq.), 15 U.S.C. § 1692i, and TILA.

The collection agencies agreed to settle the account and seize all their collection or negative credit reporting actions. MBNA however, knowing that it was in violation of FCRA, CCPA, etc. still continued in its refusal and litigation.

Only ONCE in paragraph 33 of it answer to Samadi's complaint, MBNA never ever mentioned the word "arbitration" through nearly ten (10) months of proceedings in the District Court and request for discovery. MBNA also never mentioned or raised any flag/issue that

there was an amended agreement in place between the parties. Not until the motion to compel arbitration, did MBNA ever address its so called "Amended Agreement"

Yet, the day before MBNA's deadline to provide discovery to Samadi, MBNA files a motion to stay and compel arbitration and supported it with its Vice President's Affidavit. In the affidavit it stated that an amended agreement which contained arbitration clause was mailed to Samadi through a third party who contacted the production and mailing of such amendment with yet another company in 2000. Unaware of MBNA's motion, Samadi received a call from the Clerk of the District Court stating that there is a hearing set for a few days later.

Before hearing, Samadi received MBNA's motion. He immediately objected to the motion and MBNA's Vice President's affidavit. Samadi's objection extended to the terms of the amendment and clause regarding arbitration. Samadi **had never received the amended agreement and was dumb founded by such claim**. During the hearing, Samadi renewed his objection along with a verbal motion to strike (due to the absence of MBNA's witness and lack of cross-examination) and immediately filed his written motion to strike the affidavit for lack of cross-examination the following day.

The Magistrate Court, denied Samadi's motion to strike, granted MBNA's motion for arbitration. The Magistrate Court shifted the burden of proof to Samadi by stating that if MBNA claims that a third party mailed the agreement, Samadi must prove he did not receive it. That Court further stated that the burden shifts when a party claims that such agreement was mailed through U.S. regular mail. Samadi appealed to the 11th Circuit Court of Appeals and renewed the facts along with new arguments. In his appeal Samadi even requested for Oral Argument before the Court of Appeals, where his request was ignored. Both Courts below shifted the burden of proof to Samadi on a bias of simple allegation that MBNA claiming that a third party company was contracted to use regular mail to send the terms of the amended agreement.!!

Furthermore, the Court of Appeals resolved the issue of agreement in favor of MBNA in diversity of citizenship issues. The Court below held that the terms of the contract are binding by the laws of Delaware, where MBNA is incorporated versa the state in which the initial agreement was entered into.

Therefore, Samadi respectfully addresses the following questions to this Honor[illegible] Supreme Court.

1. Is [illegible]nstitutionally lawful and valid to **add new terms and conditions** to an initial agreement, years after the initial agreement was entered?
2. Is it constitutionally lawful and valid to assume that new additions to the terms of an agreement can be coerced without support of delivery, confirmation, verification, acknowledgement or response by parties? (non-receipt of agreement)
3. Is it constitutionally lawful and valid to assume that a person is responsible for an action, when the individual is unaware of such action has or is taking place? (shifted burden of proof)
4. Is it constitutionally lawful and valid to arbitrate the violations of federal law?
5. If so, should the same not apply to the individuals who are stopped for traffic citations or indicted for violation of crimes. In other words should arbitration not apply to crimes (at minimum) less severe crimes instead of an accused facing judicial review by a court?
6. Is it not violation of initial agreement when the credit card company under the pretense of Amended Agreement (when and where it enters and holds **new terms and conditions, NOT AMENDMENT to the existing TERMS**), states and forces consumer not to OPT-OUT or otherwise face severe consequences of much higher rates and/or immediate payment of the entire balance?
7. Is it constitutionally right to banish and deny a claimant's rights (in litigation) to discover or cross-examination of witness in violation of Sixth Amendment right of confrontation (claiming that Petitioner did not request for timely hearing) when (a) hearing was immediately set by the Court upon receipt of MBNA's compel to arbitrate, (b) the claimant was the subject of medical hardship and was also distracted by father's cancer)?
8. Are the actions of Respondent (MBNA) not in violation of the Seven Amendment of the Samadi's right?

9. Are the issues raised herein not violation of rights under the Equal Protection Clause of the Fourteenth Amendment?
10. If arbitration is mandatory and enforceable through coercion, should it not have applied to MBNA (before it sold the account shortly after the account became in default)?
11. Is it constitutional to enforce a particular state law, where and when the parties entering into the initial agreement through interstate commerce (when delivery of the amendment agreement is questionable)?

Background and Facts

A verbal Credit Card agreement was entered into in1996 through a telephone solicitation. Samadi was and has been a resident of Georgia ever since the solicitation and verbal agreement between MBNA and himself. At the time such agreement was entered, MBNA representative quickly read all the terms and asked if Samadi wished to do a balance transfer. Samadi; therefore, initiated a large balance transfer in order to close another account. Days later, the written agreement arrived. Even if Samadi wanted to cancel such agreement as he may have not agreed to some of the written terms, it would have been too late and impossible, since his balance had already transferred and the other account was closed.

The parties continued in their relationship for years as MBNA repeatedly raised the interest rate in violation to the continual rate agreements between parties. MBNA also continued holding Samadi's monthly payments and applying them after the due date (even when payments were sent timely). Samadi continually requested an alternative method of payments that would insure "guaranteed and timely" payment and reduce the issues of being charged late fees. Any suggestions MBNA representatives made, Samadi accepted, however, it would back fire against Samadi at a later date. An example of such, Samadi was asked to send-in a bundle of "postdated checks" one for each pay cycle. However, MBNA presented all checks at once, creating massive liabilities for Samadi towards his other creditors and bill collectors.

Yet, Samadi continued his relationship with MBNA despite all problems and issues created by MBNA. Frequently, Samadi would request for payment options (Auto-draft) as all other creditors and much smaller bill collectors had offered. Samadi would be

repeatedly lied to and deceived by MBNA representatives. Samadi even requested insurance protection and was told it was not available.

While Samadi was detained, the only accounts that were not paid regularly (through some auto payment method) were his American Express, and MBNA accounts; because these companies did not offer insurance protection nor alternative payment method in which the monthly payments would automatically be covered through one of Samadi's funds account. Three or four months after the account was announced to be in default, MBNA without any **formal demand**, **collection attempt** or **any alternative actions to secure communications or payments** (**as all creditors and bill collectors do**), sold the account at a fraction of face value to what it claimed to be an outside collection agency and wrote the account as charge off against Samadi's credit report..

Immediately upon his return from horrifying and indefinite detention of nearly 10 months (in violation of ***Zadvydas***), Samadi contacted MBNA, American Express and Discover Card to bring his accounts current. American Express and Samadi had preset agreement for arbitration in case of dispute. Discover card had offered Insurance protection in case of hardship. Therefore, Samadi was able to enter into payment agreements and bring those accounts in good standing in a matter of a month and closed those account shortly thereafter.

MBNA on the other hand was rude and uncooperative. Samadi took all legal measures (other than litigation) and continued his one directional communications with the executive offices of MBNA (to include the President and CEO on two occasions). All Samadi's attempts failed. Even the day before filing his complaint in the District Court, Samadi contacted one of the Vice President's of MBNA in an attempt to reason and warn as to his litigation attempt. The representative responded, *"we already have notes in our system that you are planning to sue us."*

The complaint accused MBNA and its collection agencies on a series of violations of **Fair Debt Collection Practice Act** (15 U.S.C. §1692) "FDCPA" §§ 801 thru 818, 12 C.F.R. § 226.4, **Consumer Credit Protection Act** (15 U.S.C. § 1601 et seq.), **Fair Credit Reporting Act** hereafter "FCRA", 15 U.S.C. § 1681 et seq., FCRA Sections 601 thru 625; as well as, the **Georgia Fair Credit Extension Act** and **Consumer Credit Protection Act** (CCPA)

Public Law 90-321, 82 Stat. 146, et seq.), 15 U.S.C. § 1692i, and TILA. The collection agencies agreed to settle the account and seize all their collection or negative credit reporting actions. However, MBNA knowing that it was in violation of FCRA, CCPA, etc. still continued on its refusal.

Moreover, Samadi argued that MBNA's denial of performing its legal obligation as required by FCRA and CCPA to properly investigate the issues raised by Samadi and his inability to make payments as he was not physically or emotionally free.

Surprizingly, unaware of any motion filed by MBNA, Samadi received a call from the Clerk of the District Court stating that there is a hearing set for a few days later (when he was busy with his own pre-surgery affairs and father's cancer issues). MBNA filed a motion to stay and compel arbitration and alleges that an amended agreement was in place. However, other than in paragraph 33 of it answer to Samadi's complaint, MBNA never mentioned the word "arbitration" throughout the ten months of proceedings in the District Court and request for discovery. In fact the **only time** the word "arbitration" was ever mentioned until the motion to compel arbitration, was in its answer to Samadi's complaint (Pp 33). And not until the motion to compel arbitration, did MBNA ever address its so called "Amended Agreement" Yet, the day before MBNA's due date to provide documentation requested by Samadi through his discovery, MBNA files a motion to stay and compel arbitration and supports it with one of its Vice President's Affidavit. In that affidavit, the VP claims that an amended agreement which contained arbitration clause was mailed to Samadi through a third party who contacted the production and mailing of such amendment with yet another company. The VP also claimed that this second outside-source sent the amendment through US regular mail.

Before the hearing, Samadi receives the motion from MBNA. He immediately (as his time to attend his father's affairs allowed) objected to the motion and MBNA's Vice President's affidavit who claimed that an amended agreement was mailed to Samadi (in 2000). Samadi's objection extended to the terms of the amendment and clause regarding arbitration. Samadi also presented his own affidavit pre-hearing argued that he never received the amended agreement and was dumb founded by such claim. During the hearing, Samadi renewed his objection along with a verbal motion to strike (due to the absence of MBNA's witness) and immediately the following day

filed his written motion to strike the affidavit for lack of cross-examination.

Before, during and after the hearing, Samadi claimed and argued:

a. MBNA never presented Samadi with any notice to its amended agreement or the actual amended agreement. He presented facts and MBNA's monthly statements that no such notification was ever given and that MBNA's monthly statements further supports that at no time MBNA addressed that an amendment is being mailed or was mailed to card holders. Unlike American Express or other credit card companies that notifies cardholders through notices on the monthly statements, MBNA never put cardholders on any notice as to such amendment or arbitration in order to verify, confirm or reassure cardholders of the existence of such amendment or arbitration;

b. That opting-out on amended agreement at minimum required a notice or cardholders' awareness as to the existence of amendment and arbitration and that be given an opportunity/option to respond. However, MBNA claimed that it sent the amendment and **if card holder does not respond it means he is not going to opt-out**. It was obvious that MBNA does/did not care if Samadi did not receive the amendment; therefore, he would not know to respond; consequently, "so what?", "too bad, so sad";

c. MBNA's Vice President did not present any evidence in her affidavit to support that such amended agreement was ever sent out. Other than her own statement that MBNA contracted with a third party vendor who contracted with another company to mail the amendment, no other statement, facts, evidence or supporting documentation presented or exists especially from these other companies which presumingly mailed such alleged amendment;

d. That MBNA's Vice president has much personal interest (as an executive employee and stock holder) in the out-come of this litigation and of course she would present such affidavit; however, the Court denied Samadi's right to cross-examination as MBNA's Vice President (only witness) was not present during the ONLY hearing;

e. Samadi also argued that the terms of the amended agreement **was not the extension of the initial agreement but newly defined terms and conditions;**

f. Moreover, Samadi agued much of the bias and inconsistent terms and conditions of the amended agreement. Most of the terms and

conditions of the amendment were not only in contradiction to the initial agreement, but also in violation of Samadi's rights and Truth-In-Lending Act.

g. Samadi argued that the Supreme Courts of all states (that had credit card litigation before them) and the majority of Court of Appeals disagree with a "**coerced**" arbitration agreement (in the manner that MBNA presented it's Amended Agreement and its arbitration clause). In that Samadi even used an example where he made a claim against the Magistrate Court and that if the Court did not reply to Samadi's Claim, it meant that the Court agreed with the terms of Samadi's claim; (deceptive and coercive);

h. Samadi further argued, if arbitration is mandatory and enforceable even through coercion, should it not apply to all parties? MBNA sold the account at a fraction, and charged off the account as bad debt on Samadi's credit history (when for over two decades he has held an excellent credit report), **yet, never attempted collection nor "Arbitration" (inconsistent with the terms of its own amended agreement and while holding the account).**

i. Samadi also argued and presented facts that Arbitration is unfair and bias.[1] (bring in arguments and facts of arbitration as a footnote from Objection in DC and 11th cir.);

j. Finally Samadi argued the diversity of Citizenship MBNA claimed that this litigation is subject to Delaware laws, and Samadi argued the agreement was entered into in 1996 in the State of Georgia.

The Magistrate Court, in its Report and Recommendation, denied Samadi's Motion to Strike, affidavit (a present witness in the Court) and his objection to motion to stay and compel arbitration. The Court granted MBNA's motion for arbitration based upon an affidavit of an absent witness. In doing so, the Magistrate Judge relied on the theory that because MBNA Vice President's Affidavit stated that an amendment was mail to Samadi and it has no information that the mail was returned, therefore, Samadi must have received the mail.! After receiving this Report and Recommendation, Samadi argued that U.S. Postal service delivery is not error proof and that even the Respondent's attorney agreed. Moreover, Samadi holds evidences that even in cases of certified mail which requires return receipt and signature of parties) or a guaranteed return of the mail to the sender (if recipient does not

claim the certified U.S. Mail) his mail was repeatedly being decimated by the dead letter department of the U.S. Postal Service (due to the postal Service error) instead of being returned to him. Consumers' reliability on the U.S. Postal Services has decreased due to its repeated errors (Samadi has experienced Six personal losses of valuable documents and in this litigation alone, he has two). Furthermore, if Respondent admits that the mail was returned, then it would surely show it liability to the action filed herein and would be responsible for damages. Furth rmore, Samadi argued that even in his relationship with MBNA, he had to repeatedly request for duplicate monthly statements; because he was not receiving or it was not being mailed to him. Evidence of such was also provided to the District Court (since most of the statements marked as Exhibits in the original complaints were not the actual statements sent by MBNA but a reprint/copy that was mailed by MBNA at Samadi's request). Would MBNA admit that the mail had been returned? Of course not.!

Samadi appealed to the United States Court of Appeals for the 11th Circuit and renewed the facts along with new arguments. Samadi extensively argued decisions and holdings of other Circuit Courts opposing arbitration, holdings and opinions of this Honorable Supreme Court regarding coercion and deceptive contracts, and also decisions and ruling of the Supreme Court of most states denying arbitration even in loan account situations (where the arbitration existed and agreed upon by all parties). In his appeal, Samadi even requested for Oral Argument before the Honorable Court of Appeals, where his request was ignored.

Both Courts below not only resolved all issues including the diversity of citizenship in favor of MBNA, but also shifted the burden of proof to Samadi. By that, the Courts stated that Samadi did not prove he had not received the amended agreement/arbitration clause. They further accused that Samadi did not request for deposition or a hearing to cross-examine testimony of witness (when the Court itself held a speedy hearing for MBNA's motion to stay).

The Honorable Appeals Court, also stated,

> *"Any notice of an amendment sent by the bank may be included in the same envelop with a periodic statement or as part of the period statement or in other materials sent to the borrower." Id.* at 5

However, that is not what MBNA claimed. MBNA's Vice President claimed that a third party company who was contracted by another company who was contracted by MBNA sent a separate agreement to Samadi via regular U.S. Mail (with no attachment included).

Samadi again dumb founded can not understand how a non-receipt of a document can be assumed otherwise, and can be proven or how many more hearings were needed to resolve the same exact issue in which the court set a hearing??!!

The opinion of this Honorable Court previously was that; "*In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved*"

Arguments and Citations

The Courts simply denied Samadi the right to cross-examination, perform discovery on a technicality that Samadi did not request a hearing on a motion to compel arbitration and did not request cross-examination of the only witness MBNA presented. This coercion of MBNA was nothing new. MBNA's counsel was aware of Samadi's parents' medical conditions and the time constraint upon Samadi when MBNA filed its motion to compel and stay proceedings. It seems makes a practice of taking advantage of Samadi's dilemma.

Even if Samadi did not request a separate hearing, one had already been set by the Court (even before Samadi knew what the hearing was about, since he had not received MBNA's motion).

In Michael A. Lebron, v. National Railroad Passenger Corporation (No. 93-1525) [February 21, 1995], before this Honorable Supreme Court, on writ of certiorari to the United States Court of Appeals for the Second Circuit, the Court held,

> *"Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' Yee v. Escondido, 503 U. S. ___, ___ (1992) (slip op., at 13);",*

If the issue was a presentation of facts, technicality of the case, the Courts below did not allow Samadi to present his arguments as

Samadi felt intimidated by the Magistrate Court's repeated interruption. Furthermore, the honorable Court below; stated, "*Samadi never objected to MBNA's affidavit or request an evidentiary hearing...*" *Id.* at 6. However, Samadi repeatedly verbally and in writing objected to such affidavit and requested motion to strike for lack of cross-examination.

MBNA never argued any agreement other than the initial agreement until its motion to stay, and if such an amendment existed and MBNA truly believed that, therefore, MBNA should have arbitrated the account instead of writing it off with such a massive loss, and **that since MBNA itself did not prove that such amendment or arbitration existed; therefore, the Delaware law does not apply, because there was no agreement. However, the Court below instantly assumed that Samadi received the agreement, and agreed to it but does not believe the agreement is binding.**

Nonetheless, the Honorable Court below held in differently regarding arbitration issues in its own citations elsewhere as in Samadi's matter.

Citations of The 11th Circuit Court Appeals

In *John Acevedo v. First Union National Bank* (No. 02-16334), D.C. Docket No. 01-01961-CV-CAM-1 (1/2004), the 11th Circuit Court of Appeals, reversed the ruling of Southern District Court of Florida in a very similar matter to Samadi. The 11th Circuit Court of Appeals held;

> "*... after the Federal Deposit Insurance Corporation (the"FDIC") mails notice to the last known address of the depositor, 12 U.S.C. §1822(e) (Supp IV 1992)(amended 1993). However,* ***because there is no evidence that the FDIC mailed the requisite notice,*** *we reverse and remand to district Court.*"

In Samadi's case, MBNA claimed that it contracted with a third party ... to publish and mail its amended agreement to card holders. MBNA not only did not provide any proof, but also did not even provide any statements from the party that supposedly mailed the agreement. MBNA did not prove

anything other than its Vice President (who has much at stake from the out-come of this case) stated in a vague manner that an amendment was sent. Samadi repeatedly claimed that it did not receive such amendment and even used the American Express as an example where and when parties settled because they both agreed that they had an arbitration clause between them.

Samadi also argued that if such amendment and arbitration clause existed, MBNA itself was forced to comply with the terms of such amendment. MBNA was liable to arbitrate before selling the account at a fraction and reported it as a charge off. However, MBNA did not; therefore, itself did not believe that amendment or arbitration clause between parties existed. Samadi was even denied to cross-examine this ONLY witness who **used a "hearsay" statement**. MBNA did not present any evidence, nor did it even offer any affidavit from the companies which it contracted with.

The order of the Court below at minimum did not consider the fact that if MBNA truly believed that an amendment was sent out, arbitration clause was in effect, and that all terms of such amendment was enforceable, IT (MBNA) did not purse collection attempts, or initiated arbitration. It was MBNA who claimed arbitration was enforceable; therefore, it should have followed the terms of its own agreement. Yet, the Court below contradicted its own decision in *Acevedo* and held otherwise to its own findings and law.

Citations of The 11th Circuit Court Appeals Regarding Arbitration issues

In *Ellen Sue Paladino v. Avnet Computer Technologies, Inc.*,(a Delaware corporation doing business in the State of Florida), No. 96-2341 (D.C. Docket No. 95-922-CIV-ORL-18), the Court of Appeals for 11th Circuit affirmed the District Court ruling of denial the motion by Avnet to compel arbitration (**even when the parties signed a written arbitration clause attached to the employment contract**).

The differences between the *Paladino* and Samadi's case are as follows:

. *Paladino* case is employment related, Samadi's is violation of FCRA, TILA, etc.

. *Paladino* signed an arbitration agreement, Samadi was unaware such agreement existed

Similarities between *Paladino* and Samadi's case

. Both cases addressed financial issues as a result of suffering and violations of defendants/respondents. In fact Samadi's suffering was at a larger magnitude than *Paladino*, because, Samadi's credit life was destroyed by improper conduct of MBNA (in violation of FCRA, TILA, etc.) which disabled him from his pursuit of loans to bring his life to normalcy after such devastations. Even if we presume that *Paladino* has lost her employment, her credit life was not changed and that she would simply have the opportunity to locate other employments, while Samadi could have not secured finances as he tried.

In *Damiana Perez v. Globe Airport Security Services, Inc.*, No. 00-13489, (D. C. No. 00-00686-CV-KMM), June 12, 2001, the 11th Circuit Court of Appeals again affirmed the ruling of the District Court of Southern Florida denying the Motion to Compel Arbitration **of a signed and agreed upon Arbitration contract**. The Appeals Court held,

> *"Including an unlawful provision would cost the employer little, particularly where, as here, the arbitration agreement provides the employee must bear the employer's court costs and attorneys' fees incurred defending the agreement if arbitration is challenged and the employer prevails.4 If the court were inclined to reform this agreement, it would be more appropriate to limit the causes of action covered and exclude claims under Title VII and other statutes that permit an award of fees and costs to the prevailing party."*

And,

In *Larketta Randolph, et el., OLPH, (Plaintiff-Appellant), v. Green Tree Financial Corp-ALABAMA*, No. 98-6055 (June 22, 1999), **The 11th Circuit Court of Appeal again held against an**

existing arbitration signed by parties involved in a financial transactions. By that, the Appeals Court held;

> *"We conclude that the arbitration clause at issue here is unenforceable. Because we decide the issue on this ground, we need not decide whether the TILA precludes all arbitration agreements. For these reasons, we REVERSE the district court's order and REMAND for further proceedings consistent with this opinion."*

Randolph's case is Financial Loan agreement with very much similarity to Samadi's case herein. The differences between the two cases are:

(a) *Randolph* is a secured loan, versa Samadi's an unsecured (credit card) loan requiring a more accurate guidelines to secure all parties interest,

(b) *Randolph* had an arbitration agreement signed and in place, while, Samadi was unaware of such agreement was coerced upon him years after,

(c) *Randolph*.had previous knowledge of the arbitration before filing litigation; however, Samadi was informed during the litigation proceedings (a decade later),

(d) *Randolph* was in default at a free will; while, Samadi's default was involuntary and caused by illegal detention

(e) *Randolph* did not want to cooperate, while Samadi upon his return took all measures to cooperate and bring his account current but MBNA did not want to cooperate.

ISSUES RELATING TO DIVERSITY OF CITIZENSHIP

Citizenship of a National Bank such as MBNA

In *Wachovia Bank, National Association, Petitioner v. Daniel G. Schmidt, III, et al.* (No. 04—1186) this Honorable Supreme Court stated and held the followings on writ of certiorari to the United States Court of Appeals for the Fourth Circuit, [January 17, 2006]

> *"Petitioner Wachovia Bank, National Association (Wachovia), is a national banking association with its designated main office in Charlotte, North Carolina.1 Wachovia operates branch offices in many States, including South Carolina.2*

The litigation before us commenced when plaintiff-respondent Daniel G. Schmidt III and others, citizens of South Carolina, sued Wachovia in a South Carolina state court for fraudulently inducing them to participate in an illegitimate tax shelter. Shortly thereafter, Wachovia filed a petition in the United States District Court for the District of South Carolina, seeking to compel arbitration of the dispute. As the sole basis for federal-court jurisdiction, Wachovia alleged the parties' diverse citizenship. See 28 U.S.C. § 1332. The District Court denied Wachovia's petition on the merits; neither the parties nor the court questioned the existence of federal subject-matter jurisdiction. On appeal, a divided Fourth Circuit panel determined that the District Court lacked diversity jurisdiction over the action; it therefore vacated the judgment and instructed the District Court to dismiss the case.

The Court of Appeals' majority observed that Wachovia's citizenship for diversity purposes is controlled by §1348, which provides that "national banking associations" are "deemed citizens of the States in which they are respectively located." As the panel majority read §1348, Wachovia is "located" in, and is therefore a "citizen" of, every State in which it maintains a branch office. Thus Wachovia's branch operations in South Carolina, in the majority's view, rendered the bank a citizen of South Carolina. Given the South Carolina citizenship of the opposing parties, the majority concluded that the matter could not be adjudicated in federal court. 388 F.3d 414, 432 (CA4 2004).

Treating venue and subject-matter jurisdiction prescriptions as in pari materia, 388 F.3d, at 422—423, the Court of Appeals majority overlooked the discrete offices of those concepts. See supra, at 11—12; cf. Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333, 337 (1933) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more

than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against."). The resulting Fourth Circuit decision rendered national banks singularly disfavored corporate bodies with regard to their access to federal courts. The language of §1348 does not mandate that incongruous outcome, nor does this Court's precedent.

***

For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.
It is so ordered."

The case above is very consistent with Samadi's case and arguments. Samadi argued and claimed that MBNA is a national bank that does business in all states and has offices and registered agent in the State of Georgia. Furthermore, Samadi presented the fat that the initial and only agreement between the parties were in the state where Samadi has been residing eversince the agreement was entered in 1996. Samadi, also presented holdings of other United State Circuit Court of Appeals that resolved issues of Diversity of Citizenship. Moreover, the decision of this Honorable court was ordered well before the 11th Circuit Court of Appeals made its decision in Samadi's case, yet, the Court below held contradictory to the findings of this Honorable Court and its other honorable counterparts.

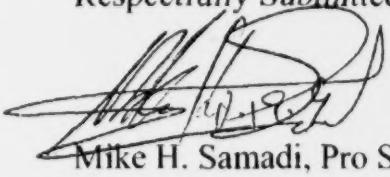
In United States Trust Company of New York v. New Jersey, 431 U.S. 1, Appeal from the Supreme Court of New Jersey, No. 75-1687 Argued: November 10, 1976 --- Decided: April 27, 1977, the SUPREME COURT OF THE UNITED STATES, reversed the decision of both State Supreme Court in which affirmed the ruling of the New Jersey State Court on issues relating to contract clause which can similarly be construed in the action of Samadi v. MBNA.

CONCLUSION

Other than the case of *Smiley v. Citibank (South Dakota), N. A.*, 517 U. S. 735, 741, which is unrelated to the issues of Samadi's case, Samadi could not find any other cases before this Honorable Court where the opinion and ruling of this Court was regarding similar matter to Samadi's. Nor could Samadi find any other cases before this Honorable Court which ruled similar to the Court below on similar matters. On the other hand, in all proceedings before the Magistrate Court, the District Court and Court of Appeals, Samadi was able to present holding of this Honorable Court and other Circuit Courts of Appeal and the State Supreme Courts deciding consistent with Samadi's arguments as to coercion of amendment, arbitration, and diversity of citizenship. Yet, Samadi feels that the denial of his arguments has nothing to do with his arguments or case but his **pro se defense**

WHERFORE, Samadi respectfully prays that this Honorable Court answer his questions and rule in consistent with previous ruling of this Honorable Court.

Respectfully Submitted,



Mike H. Samadi, Pro Se
Petitioner

FOOTNOTES:

1. In *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, in which this Honorable Court affirmed the decision of the Court of Appeals of California. This Court affirmed and stated;

> *"1. The Court of Appeal's conclusion that the parties intended the choice-of-law clause to incorporate the California arbitration rules into their arbitration agreement is a question of state law, which this Court will not set aside. Pp. 474-476.*
>
> *2. The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. Moreover, since the FAA's principal purpose is to ensure that private arbitration agreements are enforced according to their terms, it cannot be said that application of 1281.2(c) here would undermine the Act's goals and policies.* ***Arbitration under the Act is a matter of consent, not coercion, and the parties are generally free to structure their arbitration agreements as they see fit."***

APPENDICES

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APPENDIX 1.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-14387
Non-Argument Calendar

D.C. Docket No. 04-00137-CV-AAA-1

MIKE H. SAMADI,

Plaintiff-Appellant,

versus

MBNA AMERICA BANK, N.A.,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Georgia

(APRIL 21, 2006)

Before BLACK, CARNES and PRYOR, Circuit Judges.

PER CURIAM:

Mike H. Samadi, proceeding *pro se*, appeals the dismissal of his complaint without prejudice following the grant of MBNA's motion to compel arbitration. Samadi asserts the arbitration

agreement was not binding, the District Court did not err, and we affirm.

I.

MBNA contends this Court lacks jurisdiction because Samadi's notice of appeal failed to identify the court to which the appeal was taken, as required by Federal Rule of Appellate Procedure 3(c)(1). A Notice of appeal "must: (A) specify the party of parties taking the appeal...; (B) designate the judgment, Order, or part therefore being appealed; and (C) name the Court to which the appeal is taken." Fed. R. App. P. 3(c)(1). However, "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." Fed. R. App. P. 3(c)(4). Additionally, *pro se* litigants' pleading are to be construed. *Tannenbaum v. United States*, 148 F. 3d 1262, 1262 (11th Cir. 1998).

Although Samadi's notice of appeal did not specify he was appealing to this Court, his notice was timely filed in the correct district court and identified the correct parties to the suit and the district court's case number. Construing Samadi's *pro se* filing liberally, his notice of appeal was clear and otherwise complied with the requirement of Rule 3©, and we have jurisdiction over this appeal.

We review the District court's decision to compel arbitration de novo. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1368 n.6 (11th Cir. 2005), *petition for cert. filed*, (U.S. Jan 30, 2006) (No. 05-959). "If all the provisions of the arbitration clause are enforceable, then the court must compel arbitration according to the terms of the agreement." *Terminix Int'l., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1331 (11th Cir. 2005).

The Validity of an arbitration agreement is generally governed by the Federal Arbitration Act (FAA). 9 U.S.C. §§ 1 *et seq.* 9 U.S.C. §§ 2 states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration and existing controversy arising

> out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"[W]hile the FAA requires that the arbitration agreement be in writing, it does not require that it be signed by the parties." *Caley*, 428 F.3d at 1368. If a suit brought in the district court contains "any issue referable to arbitration under an agreement in writing for such arbitration," and one of the parties makes a motion to stay the proceedings, the district "shall… stay the trail of the action such arbitration has been had in accordance with the terms of the agreement…." 9 U.S.C. § 3.

"[C]ourts have consistently found that claim arising under federal statues may be the subject of arbitration agreements and are enforceable under the FAA." *Caley*, 428 F.3d at 1367 (citations omitted). General contract principal apply to arbitration agreements. *Id.* At 1372. "[S]tate law generally governs whether an enforceable contract or agreement to arbitrate exists." *Id.* At 1368. "Thus, in determining whether a binding agreement arose between the parties, courts apply the contract law of the particular state that govern the formation of contracts." *Id.* "[A] court can decline to enforce an arbitration agreement under the FAA only if the plaintiffs can point to a generally applicable principle of contract law under which the agreement could be revoked." *Id.* At 1371 (emphasis omitted).

"A federal district Court is bound to apply the conflict of laws rules prevailing in the forum state." *Judge v. Am. Motors Corp.*, 908 F. 2d 1565, 1577 (11th Cir. 1990). Under Georgia Law, choice –of –law provision is contracts are enforced in the absence of contrary public policy. *Scales v. Textron Fin. Corp.*, 622 S.E.2d 903, 904 (Ga. Ct.App. 2005). In this case, where the contract explicitly designates Delaware law as the law that applies, and no public policy contrary to enforcing the parties' choice of law has been identified, Delaware law should be applied.

Under Delaware law, "a bank may at any time" amend a revolving credit plan agreement "in any respect, whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties or is integral to the relationship between the parties." Del. Code Ann. Tit. 5, §-952(a) (2005). Arbitration is specifically listed as one of the terms of an

agreement that may be altered. *Id.* "Any notice of an amendment sent by the bank may be included in the same envelop with a periodic statement or as part of the period statement or in other materials sent to the borrower." *Id.*

Federal Rule of Civil Procedure 43(e) provides; "When motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition." We have held it is not an abuse of discretion to decide a motion to dismiss based on affidavits and other documents where neither party made a timely request for a hearing. *Sunseri v. Macro Cellular Partners*, 412 F. 3d 1247, 1249-51 (11th Cir. 2005).

The Delaware Superior Court has held the same arbitration clause at issue n this case, sent out in the same manner as in the instant case, was enforceable. *Edelist v. MBNA Am. Bank* 790 A. 2d 1249, 1257-60 (del. Super. Ct. 2001). In that case, MBNA presented the affidavit of a Senior Vice President, stating MBNA had mailed notice of the amendment to the address where the plaintiff's statement were sent on or about December 20, 1999, and MBNA's files contained no information that the plaintiff opted out of the arbitration provision. *Id.* at 1251, 1254. As in the instant case, the plaintiff claimed he never received the notice of the amendment, but provided nothing more than his assertion he never received the mailing. *Id.* at 1258. The Delaware court held MBNA's affidavit was sufficient to show the plaintiff received the notice and failed to opt out of the arbitration agreement. *Id.*

Samadi never objected to MBNA's affidavit or requested an evidentiary hearing, and the district court did not abuse its discretion in relying on the affidavit. The original agreement stated it could be amended pursuant to Delaware law and MBNA's affidavit showed the amendment has been sent out in compliance with Delaware law, thus, the arbitration agreement was valid. The agreement was broad enough to cover all of Samadi's claims, and the district court did not err in dismissing the case and granting the order to compel arbitration. The district court protected Samadi's right to litigate any issues found non-arbitrable by dismissing the case without prejudice.

AFFIRMED.

APPENDIX 2.

REPLY TO APPELLEE'S BRIEF
RESPONSE TO MBNA'S STATEMENT OF JURISDICTION

Appellee (hereinafter "MBNA") claims that this Curt does not have jurisdiction to review this appeal because, Appellant (hereinafter "Samadi") did not identify the court to which the appeal is taken as required by Fed. R. App. P. 3(c)(1). Therefore, *"this deprives this Court of jurisdiction over the appeal."* Samadi presents:

A. In the days that every attorney wishes to be retained by the use of such high retainers, it had been impossible for Samadi to seek continuous advise of counsel. Samadi attempted several times to retain an attorney but was even unable to obtain a loan (to pay an attorney) due to MBNA's conduct against Samadi's credit worthiness. Although Samadi was a good standing cardholder of MBNA for years (until the day he was detained by Department of Homeland Security), even in detention he begged MBNA to cooperate, show consideration and patience until he is released. MBNA failed to review Samadi's account history and show consideration to cooperate and hold the account until he is released.

B. Samadi pursued this matter Pro Se as he had no choice. However, the logic of any proceedings in a Court mandates that an appeal is always to the higher Court than where the final decision was issued. Samadi filed the notice of appeal with the understanding that the 11th Circuit Court is the proper designation and the next higher Court than the District Court. Samadi still can not understand what other Court would have had jurisdiction to review his appeal from the decision of the United States District Court.

C. After receiving MBNA objections to his appeal, Samadi contacted the Clerk of the U.S. District Court (where the decision became final) in order to learn if any other Court would have been the proper Court. Through that research he learned that all proceedings of that Court is referred to the 11th Circuit Court of Appeal whether designated or not. In fact two of the Deputy Clerks whom have been employed by that office for more than ten years stated, *"we always forward the appeals to the 11th Circuit Court whether designated or not.."*

D. Samadi then shared the issue with an attorney who practices in the U.S. District Court. He was surprised to hear that designation of Appeal was an issue since the Court with proper jurisdiction is automatically this Court (the 11th Cir. Court of Appeals.)
E. Under Fed. R. App. P. 3(c)(4), the Court shall hold jurisdiction since the informality of form of Appeal was not intentionally performed.

RESPONSE TO MBNA'S STATEMENT OF THE CASE

The complaint was filed in August 2004 and on September 28, 2004 MBNA filed its answer. In that answer, MBNA repeatedly cited South Carolina rules which had no relevancy to the issue of contract, residency or the Court in which the complaint was file. MBNA however addressed the issue of arbitration only once in its answer (R1-3, at pp33). Yet, MBNA continued its motions and argument to include extended discovery until the day before it was to respond and submit to Samadi's discovery and used trickery to file its motion to compel arbitration.

MBNA's Deception continued until days before the hearing of June 1, 2005.

MBNA claims that it certified a copy to Samadi and that Samadi received its Motion to compel arbitration (R1-17) on May 6, 2005. **MBNA failed to properly state the fact. Samadi incorporates herein and references hereto Exhibit A (a letter from MBNA's counsel) that indicates such motion was possibly being sent to Samadi from his office on that day. Therefore, it would have been impossible for Samadi to receive the same until several days later (especially since May 6, 2005 was a Friday). However, MBNA must have forwarded the District Court copy several days prior to May 6, 2005, because the Court's docket shows that it was docketed that day. This only means that MBNA again used trickery by forwarding the Court's copy and holding Samadi's copy until days later. That was the reason Samadi was surprised and confused (while under Doctor's care) when he received a phone call at 4:30PM (while in Doctor's office) from the Clerk of the District Court who already scheduled a hearing for May 16,2005. This action by MBNA deprived Samadi as to his right to pursue proper discovery on motion to compel and related issues.**

In its statement of fact MBNA claims that Samadi's complaint against Worldwide Asset Purchasing and Collect America were subsequently dismissed with prejudice (MBNA Brief pg.2). However, MBNA failed to state that the parties in that complaint reached an agreement and jointly motioned the District Court to dismiss the matter. Samadi incorporates herein and reference hereto Exhibit B showing that the statement of MBNA is false and without merit.

Then MBNA claimed, "*MBNA timely filed an answer... asserting numerous specific defense, including improper service and the mandatory arbitration provision.*" This statement by MBNA raises several inconsistencies. They are as follows:

In its answer, MBNA's responses were nothing but vague and circumstantial. It did not address any issues in any specific manner. MBNA only denied all allegations of Samadi's complaint and repeatedly used the words "South Carolina Constitution" (without use of any SC rules).

MBNA did not address any issues regarding "Mandatory Arbitration". In that (Dist. R1-3, pp33), MBNA stated:

> *"Upon information and belief, Plaintiff's claims are subject to an enforceable arbitration agreement...the provision of said arbitration agreement are incorporated herein by reference."*

However, MBNA did NOT incorporate any provisions and or referenced to any articles or documentation as a result of such statement and therefore that statement does not serve any weight and must be dismissed.

MBNA also addressed the issue of improper service; however, it failed to specify that its counsel sign and faxed the waiver of service over a week prior to filing its answer with the District Court. Samadi incorporates herein and references hereto Exhibit C, showing that MBNA faxed a signed COPY the "waiver of Service of Summons" to Samadi; however, its fax header was wrongly dated as it reads September 20, 2004 while the Counsel's signature shows the date of December 15, 2004.

Although MBNA did NOT forward the original Service of Summons until March 2005, delaying Samadi's response to the Court Order of such proof of Service of Summons, however, MBNA acknowledged service of summons appropriately. Therefore, MBNA's statement regarding "*including improper service*" must be

discarded and dismissed. MBNA's statement presents further deception to the Courts.

MBNA also claimed that Samadi did not file an amended complaint. As the issues between Samadi and the parties (to include the second party plaintiff had changed, Samadi did not see any reason to amend his complaint. The District Court did not mandate or Ordered that Samadi MUST amend his complaint. On the contrary, the Court suggested that if Samadi wishes to amend his complaint then he must do so and follow set instruction of the Court.

On page 4 of its brief, MBNA claimed *"Samadi never disputed that the agreement provided for amending it through notice and failure to opt-out..."*. It is true that Samadi agreed to the terms of the original agreement; however, he never thought nor agreed to a subject to surprise, trickery or deception by MBNA as to its amended Agreement. As previously argued before the District Court and in Samadi's brief, throughout the years, Samadi contacted MBNA on all issues and made notation on his card statements (provided to the Court as his Exhibits A through C attached to his original complaint Rec1-1). On those statements, the Court will notice that Samadi asked questions about interest, finance charges, late fees, balance or other issues but never discussed or raised any issue relating to arbitration of amended agreement. If at any time Samadi was aware of such amended agreement, he would addressed it with MBNA at minimum once and made notation in that regards.

In the same paragraph, MBNA further stated; *"he offered only his own affidavit..."* MBNA's claim is far fetched as itself did not provided any documentation or proof other than affidavit of a senior Vice president that has a higher interest in the out-come of this matter than Samadi does. MBNA's vice president with a salary of over $150,000.00 per year and many stock options would have nothing else to say than an untrue statement that an amended claim was mailed to Samadi yet not be able to support it. Ms. Simpkins would have more to lose in this mater than Samadi would. Yet MBNA claims that Samadi offered ONLY his own affidavit. Furthermore, MBNA wishes for the Courts to accept its affidavit and ignore Samadi's while MBNA has not offered any proof to support the affidavit while at minimum Samadi provided years of his notation and communications with MBNA.

MBNA also claimed that Samadi offered any oral testimony at the hearing. As discussed in his objection to the report and

recommendation (R1- 28), in the hearing of June 1, 2005, the magistrate Court interrupted Samadi twice, making it uncomfortable for Samadi to continue, by not allowing him to present all his fact. Samadi felt intimidated and unable to present witness's testimony. Also as stated previously, the hearing of June 26, was bias and unfair as it deprived Samadi in completing his oral arguments and citations

MBNA then claimed that the day after the hearing, Samadi filed a motion to strike the Simpkins affidavit. (R1-25). Again MBNA failed to reveal to this court that during the hearing of oral argument (June 1, 2005), Samadi verbally requested that since Simpkins is not available for testimony nor examination under oath, Samadi requested that her affidavit be stricken from the record (see Transcript at 24).

RESPONSE TO MBNA'S STATEMENT OF FACT

MBNA claimed *"Samadi used the Credit Card and account 'after' receiving the Agreement."* AS Samadi stated previously, MBNA continues on it deceptive practices and repeatedly makes false statements. MBNA failed to state that at the time of marketing call and account establishment when the credit was expended, MBNA recommended that Samadi transfers balance from his higher interest rate cards to MBNA. This balance transfer took place well in advance of receiving the original agreement. MBNA may not be able to clearly distinguish that credit was extended and account was used well in advance of Samadi knowing about the terms of said agreement. In such cases, Samadi was automatically dropped in MBNA's lap by blindly accepting the terms of its agreement because it initial offer. Samadi at no time disputed the terms of the initial agreement, because the terms of that agreement were not deceptive. However, MBNA changed the terms of the agreement to enter new terms and conditions other than changing the existing terms of the initial agreement was not agreed and the Courts saw such practice by MBNA as unconscionable.

MBNA (at 7) stated that "*MBNA may amend the Agreement 'by complying with the applicable notification requirements of federal law and the law of state of Delaware.*" However, the law does not allow MBNA to change the terms of the agreement to the extent to present a new agreement and to add additional terms to the agreement without consent of cardholders.

MBNA continued by stating that "*on or about December 20, 1999, through its agent mailed to Samadi written notification that MBNA was amending the agreement...*" MBNA keeps repeating the same issue that an amendment was mailed to Samadi; however, had never provided any proof, even when such proof was requested. The only statement to this allegation of MBNA is an affidavit of Simpkins whose interest in the out-come of this case is greatly effected. It in-fact there was an agent of a third party, MBNA has neither provided record of the third party, witness or evidence from the third party or at minimum an affidavit from an outside (third) party (even when MBNA's motive was questioned and such other proof was requested). Then MBNA states that Samadi ONLY offered his own affidavit.

Then MBNA claims that Samadi received account statements during this period. Samadi is not certain that receiving years of **scattered** account statement constitutes receiving an amended agreement that MBNA admits was sent separately. Even as to the "account statements" in which MBNA discussed, Samadi previously argued and presented facts (R1-1 Ex. A thru D, F, J), Samadi did not receive all statement and from time to time had to request for duplicate statements. In fact, MBNA refenreced Samadi's Ex. G at 1, 2 (which one is from September 1999 and the other from January 2000) proving Samadi's facts that there are some statements missing.

MBNA then claims that Samadi had an opportunity to opt-out. MBNA fails to distinguish and comprehend that a party who did not receive nor was aware that such document existed, would have not known that he must opt-out. Samadi did not hold a crystal ball to assume that MBNA was mailing an amended agreement. Therefore the is e of opting-out would become irrelevant. Besides, the terms of Amended agreement (Aff. Simpskins, that individual or entity would not be aware as to the existence of the document

MBNA also referenced FAA and applicable statues (*id* 9). Samadi reinstates his objection as he had done so in his Objection to MBNA's Motion to Compel and thereafter (R1-22 and R1-28). The Courts to include the Supreme Court has been clear that the terms of Arbitration when the parties had not agreed are unconscionable (R1-22 and 28). Moreover, Arbitration does not offer contractual, punitive or any other damages in which a party had suffered. Research reveals that an arbitrator only concerns his/herself with the actual monetary amount at loss. In fact in most cases Arbitrator do

not even grant the arbitration expenses. Arbitration does not offer any damages. Moreover, the terms and conditions and policies of Arbitration only favors Creditors and are bias. In fact several Circuit Court of Appeals along with the Supreme Court held opinion in regards to arbitration (R1-22 at 7 thru 17) with emphasizes on *Brady v. US 397 US 742, 748* (R1-22 at 17). In *Brady* (1970) the US Supreme Court held that;

> *"Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."*

Then MBNA offers consoling statement to remedy Samadi's' financial situation in relations to the FAA fee issues. It stated, *"the Arbitration Provision limits the arbitration fees ... amount equal to* ***'HYPOTHETICAL'*** *court cost."*

Possibly the word "HYPOTHETICAL" bests describes MBNA claim as to mailing the amended agreement and not the arbitration expense. Samadi researched the FAA web site for its fees in regards to matter such as this issue and was quoted fees over $2,000.00. This is not a "hypothetical" situation as MBNA wishes to reference. The reality is that Arbitration not only cost much more, is unfair, bias does not offer the same judicial review, nor offers a trial when and where damages and fees and expenses are also considered.

RESPONSE TO MBNA SUMMARY OF ARGUMENTS

MBNA did not offer any arguments other than rehashing the previous arguments through its brief and Motion to compel Arbitration (R1-21). MBNA repeatedly states that Samadi failed to offer any evidence other than his own affidavit that he did not receive the amended agreement. It is not clear that what evidence MBNA is seeking when a person does not receive a document. Was Samadi supposed to present a "bible" of evidence presenting that he did not receive the amended agreement? How can a person make such proof? However, Samadi had not only presented to the Court that on his monthly card statements (R1-1 Ex a thru d, G, J) does he show any notation that Amended agreement was never discussed nor noted. This is at minimum much more evidence or proof than what MBNA offered as to its proof that such amended agreement was sent.

Finally, Samadi respectfully believes that the District Court erred by denying Samadi's Motion to Strike Simpkins Affidavit, because legal argument was presented and that an affidavit without the author testifying is not allowed not acceptable in Courts during the hearing. Otherwise, the legal system and procedures will break a part when any party to a claim just submits affidavits from its witnesses without allowing the opposing party to cross examine the witness or his/her statement in the affidavit. In Fact, Samadi has been shocked to learn that the District court denied such motion and considered the Defendant's affidavit in absentia (during hearing) and not giving the opposing party an opportunity to cross-examine see 28 USC § 804 (b). Moreover Simpkins affidavit was nothing further than hearsay and such rule must apply to the affidavit. Simpkins was not the party who mailed the amended agreement nor was employed by the party that actually processed or mailed the amended agreement. The mere fact that MBNA contracted out with a third party to process and send the amended agreement to millions of cardholders does NOT constitute the Statement of Facts or legal issues. The Honorable District Court did not wish to recognize Samadi's argument not because it was not accurate because, The Court felt it had the jurisdiction to deny Samadi his rights to cross-examine the one and only witness in which MBNA presented. However, MBNA again did NOT offer any other facts, evidence or cited laws to support that its affidavit must be enforced. The District Court took it upon itself to deny Samadi his constitutional rights.

RESPONSE TO MBNA CITATION OF AUTHORITY

MBNA claims, "the District Court Correctly Held that Samadi agreed to Arbitrate His Claims." As stated in the paragraph above, in Samadi's brief and Objection to Report and recommendation (R1-23), the decision of the Honorable District Court was prejudicial as it stripped Samadi's rights to complete his argument during the hearing through the method of interruptions and distraction.

Not allowing Samadi to present his witness who was Present in the Court. The District Court's repeated interruption intimidated Samadi as to continuing with his argument and evidence.

Not allowing him opportunity to cross-examine the only yet hearsay witness MBNA was offering.

MBNA then cited the Delaware Law Governs the Agreement.

Samadi had previously argued this issue and does not wish to consume the Court with his redundancy. However, Samadi briefly notes that at the time the agreement was entered (which was a verbal agreement) no written agreement was in Samadi's possession. Samadi used the credit card trough recommendation of MBNA representative at the time the credit was extended. This transaction tool place over a week prior to his receipt of the initial agreement. Furthermore, the agreement between the parties was entered in Georgia as the solicitation card was directed to Samadi in Georgia. Therefore; on the grounds **of** the rules regarding diversity of Citizenship this Court will have jurisdiction over the matter.

In its brief (*Id.*15) MBNA states, The Courts have consistently given effect to MBNA's Amendment Procedure Under Delaware Law. In that MBNA cites *Edelist v. MBNA* stating that because that superior Court decided that matter should be within the jurisdiction of Delaware law and Court' therefore, this matter must also be. MBNA again failed to state:

1.. *Edlist* filed its complaint in the Delaware Superior Court and not in Los Angeles.

Moreover, in *Edelist* complainant did not offer any exhibits, evidence or supports as to his/their claims on the contrary to this Appellant that had provided long list of exhibits to support his allegations. -

Edelist did not dispute the existence of the amended agreement. In fact, *Edelist* did not even pursue a respond to MBNA properly through out that proceedings. Edlist should have not even filed a complaint because it did not have any ground and did not support its allegation.

If the issue of Samadi's claim was anywhere similar to *Edelist* or the claim and arguments were similar, then the issues before this Court would still not been the same since *Edelist* filed its claim in Delaware. Furthermore, it did not even provide to the Court his residence.

Then MBNA cites *Lloyd v. MBNA*. Again MBNA failed to discuss the facts that in *Lloyd*, the matter was in Delaware District Court. Furthermore, and again Lloyd did not deny the existence of the Arbitration argument as stated in MBNA's Amended Agreement. Moreover, it seems that *Lloyd* showed confusion as to what law

applies. He filed a complaint in Delaware, states that Delaware laws apply; yet somehow wished to have California laws added??!! The inconsistencies in that complaint just like the one of *Edelist* is beyond comprehension. Again, in this matter, MBNA must perform a lot better to persuade that Samadi falls within the same category.

MBNA also cited *Mackey v. MBNA* 343 F. Supp. 2 d 966 970 (W.D. Wash. 2004); however, Samadi was not able to locate such case. Samadi even extended its search to the United States District Court for Western District of Washington and was not able to locate the "Mackey" file.

CITATIONS TO UNCONSIONABLITY OF ARBITRATION

MBNA continued its defense and brief by repeating the exact same issues through out its brief. Samadi does not wish to consume the Court's time in repeating or rehashing the same issues. MBNA ignored the existence of the FDCPA, FCR, Fed. Truth in Lending and other laws related to Samadi's issues. It also ignored the existence of over twenty-eight citations of the Court of Appeals, the State Supreme Court and finally the US Supreme Court to which all share the same concerns:

An Amended Agreement must be within the scope of the original Agreement. Creditor can change only those terms encompassed within the scope of the original agreement between the parties. e.g. *SEARS ROEBUCK AND CO., Plaintiff, v. BARBARA AVERY cited previously in brief and R1-22, 23 and 28) . See also*

The terms of the agreement must be conscionable and enforceable. See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779 , 79 Cal.Rptr.2d 273. See also ***Broder v. MBNA Corp.***, No. 605153/98 (Sup. Ct., NY County, April 11, 2003. See also *Alexander v. Anthony International*, 3rd Cir. App. August 19, 2003. See also *Patterson v. ITT Consumer Financial Corporation, et al.*, San Francisco Superior Court Case No. 936818. Also ***MBNA Bank vs. DeWayne Flint.*** Samadi apologizes if his citing of the above matters are not consistent with the requirement of the Court.

A contract must be agreed by all parties **Arbitration under the Federal Arbitration Act is a matter of "'consent, not coercion'** It is not enforceable in use to the principal of general contract law. See *Wright v. Universal Maritime Service Corp.* (1998) __ U.S. __, 119 S. Ct. 391

e. Moreover, MBNA waived its rights to arbitrate when it sold the account at a discount to a third party **WITHOUT its in house pursue of resolution or collection attempt pre-sale.**

In *Patterson v. ITT Consumer Financial Corporation, et al.*, San Francisco Superior Court Case No. 936818. This Court and the Us Sup. Court also held that *"ITT's arbitration clause was ruled unconscionable and unenforceable by the trial court. That ruling was upheld on appeal."*

In *SEARS ROEBUCK AND CO., Plaintiff, v. BARBARA AVERY*, Defendant NO. COA02-925, Filed: 16 March 2004 in North Carolina Supreme. Court. That Court said:

> *"Although Sears relies heavily on the policy favoring arbitration, that policy is immaterial unless this Court first finds that an enforceable arbitration agreement exists under Arizona law.III. The Existence of an Enforceable Agreement to Arbitrate"*. (*Id.* at 796, 79 Cal. Rptr. 2d at 284.

Thus, while a credit card company may reserve to itself the right to amend its credit card agreements with its cardholders, it can change only those terms encompassed within the scope of the original agreement between the parties.)

> *"Because no enforceable arbitration agreement exists and, in any event, Sears has waived the right to compel arbitration, we affirm the trial court's denial of Sears' motion to compel arbitration"*

In *DIRECTTV, Inc. v. Mattingly*, 376 Md. 302, 321, 829 A.2d 626, 638 (2003). The Court held, *"We never reach the questions controlled by the [Federal Arbitration Act] because we hold that there was never a valid agreement to arbitrate . . . ."*

The Arizona Supreme Court has recognized that "the enforceability of the agreement to arbitrate is determined by principles of general contract law." In Broemmer, 173 Ariz. at 150, 840 P.2d at 1015. Ariz. Rev. Stat. § 12-1501 (2003) provides:

> *"A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."*

In *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 173 Ariz. 148, 153, 840 P.2d 1013, 1018 (S. Ct. 1992) (*"When agreements to*

arbitrate are freely and fairly entered, they will be welcomed and enforced. They will not, however, be exempted from the usual rules of contract law . . . "). In *Broemmer*, the Arizona Supreme Court applied these principles to hold that an arbitration clause included in a standardized contract by a medical clinic was not enforceable. The court held that "there was no conspicuous or explicit waiver of the fundamental right to a jury trial or any evidence that such rights were knowingly, voluntarily and intelligently waived. The only evidence presented compels a finding that waiver of such fundamental rights was beyond the reasonable expectations of plaintiff." *Id.* at 152, 840 P.2d at 1017.

In U.S. Insulation, Inc. v. Hilro Constr. Co., 146 Ariz. 250, 253, 705 P.2d 490, 493 (Ct. App. 1985) when reviewing agreement to arbitrate, the Court held;

> *"Grounds in equity or law for revocation of a contract include an allegation that the contract is void for lack of mutual consent, consideration or capacity or avoidable for fraud, duress, lack of capacity, mistake, or violation of a public purpose.".*

In Zimmer v. Cooperneff Advisors, Inc., 2004 WL 2933979, the Court found substantive unconscionably in the agreement's lack of a mutual obligation to arbitrate disputes. The Court goes further to Say; This decision is consistent with other courts which required mutuality in arbitration agreements: Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal 4th 83 (2000), Iberia Credit Bureau, Inc. v Cingular Wireless LLC, No. 03-30613, D.R. Horton, Inc. v. Green, 2004 WL 2028999, Ingle v. Circuit City Stores, Inc. (328 F.3d 1165, 2003), Taylor v. City Auto Sales, 2004 WL 1925423.

In *Rodriguez v. D'Ambrosio*, 2004 WL 2955910, the Court stated

> *"...Both the party to be bound to arbitration and the party seeking arbitration must have signed the arbitration agreement for it to be enforceable, according to the second district of the California Court of Appeals."*

In Gerdesmeier v. Sutherland, A03-07, the Minnesota Supreme Court refused to enforce an arbitration provision contained in an automobile insurance policy.

In *Dunkelman v. The Cincinnati Bengals, Inc.*, 2004 WL 2757190, although the trial court "punted" Dunkelman to binding arbitration, the "**fans appealed the call**" and, after further review, the Court of Appeals reversed "the call made on the field" and punted the case back to the trial court.

In *Lytle v. Citifinancial Services, Inc.*, 810 A.2d 643 (Pa.Super.Ct.2002)), The Court held;

> *"a presumption of unconscionability arises where one party 'reserves sole access to the courts.' The presumption can be rebutted by a showing of 'business realities' that compel the lack of mutuality."*

In *Stevens/Leinweber/Sullens, Inc. v. Holm Dev. & Mgmt., Inc.*, 165 Ariz. 25, 30, 795 P.2d 1308, 1313 (Ct. App. 1990) we will note the Court's statement that *"presupposes the existence of a valid agreement to arbitrate. Only when the arbitration provision is enforceable will the court compel arbitration."*

In *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 831 (S.D. Miss. 2001) (unilateral addition of arbitration clause "specifically authorize[d]" by Ohio Rev. Stat. § 1109.20(D)), *aff'd*, 34 Fed. Appx. 964, 2002 U.S. App. LEXIS 7759 (5th Cir., 5 Apr. 2002);

In *SouthTrust Bank v. Williams*, 775 So. 2d 184, 190 (Ala. 2000), holding;

> *"the Alabama legislature in enacting Ala. Code § 5-20-5, 'provided a procedure that differs in no material respect from the one [the credit card company] followed in this case'".*

In *Gaynoe v. First Union Corp.*, 153 N .C. App. 750, 754-55, 571 S.E.2d 24, 27 (2002) (applying Georgia law), *disc. review denied,* 356 N.C. 671, 577 S.E.2d 118 (2003), cited by Sears, this Court did not address the issues presented by this appeal, but rather held that when a cardholder had successfully sought an amendment to his interest rate, he could not then argue that the bank was bound by the original interest rate. Sears also relies upon a decision from the United States District Court for the Western District of North Carolina, *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574 (W.D.N.C. 2000). This decision, applying Delaware law, expressly distinguished the situation present in this case, "involv[ing] a credit

card agreement containing no arbitration clause which was later unilaterally modified to include one." *Id.* at 577-78.

In *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 820, 171 Cal. Rptr. 604, 612, 623 P.2d 165, 172-73, (1981)). The court flatly held: *"Contracts of adhesion will not be enforced unless they are conscionable and within the reasonable expectations of the parties." Id.* at 153, 840 P.2d at 1018.

In *Myers v. MBNA America and North American Capitol Corporation*, CV 00-163-M-DWM (D.Mont., March 20, 2001), in striking down MBNA's motion to compel arbitration, Chief Judge Donald W. Molloy found that the Arbitration Section cannot be enforced, and that no such agreement to arbitrate could be implied. Observing that MBNA's proposal of the Arbitration Section as a change in the terms of the parties' relationship that would be effective unless rejected by the cardholder, Chief Judge Molloy declared that, in affect, ***"MBNA skipped offer and went straight to acceptance."***

In *Meineke v. Twin City Fire Ins. Co.*, 181 Ariz. 576, 581, 892 P.2d 1365, 1370 (Ct. App. 1994).

> *"[a]n arbitration provision is waived by conduct inconsistent with the use of the arbitration remedy; in other words, conduct that shows an intent not to arbitrate."*

It goes further to say: *"In our view, a party's filing of a lawsuit without invoking arbitration . . . would nearly always indicate a clear repudiation of the right to arbitrate . . . ." Id.* at 582, 892 P.2d at 1371.

In *Shubin v. William Lyon Homes*, (2000 Cal. App. LEXIS 871), the California First District Court of Appeals found that an unconscionable provision in an employment contract must be severed. The court noted;

> *"while the Armendariz contract had several unconscionable provisions, the Shubin contract only had one California Research Bureau, California State Library 7 unconscionable provision and the "illegality is collateral to the main purpose of the contract."*

The Federal District Court for North California, **discontinues Automatic Assignment of Cases to Arbitration - Effective 1/20/05**

In March 1, 2000 Wash. Post wrote: Arbitration Forum's Rulings Called One-Sided:

Out of nearly 20,000 consumer cases involving First USA Bank that went to arbitration under the National Arbitration Forum's iron fist of justice, one of the arbitrators designated in the agreement, in all but 87 NAF ruled in favor of First USA Bank – a success rate of 99.6 percent. Carolyn E. Mayer, Win Some Lose Rarely? .

An in depth analysis of the bias of the NAF was produced as Petition of Plaintiffs and of Defendant Salmons Agency to Docket Certified Questions, Toppings v. Meritech Mortgage Services, Inc., No. 011984 (W.Va. Dec. 4, 2001). Among other things, the brief points to NAF's marketing literature, which shows the advantage creditors will have in their relationship with consumers if they sign up with NAF. NAF solicitation letters to would-be clients promise to eliminate class actions for companies who join, and coach creditors on how they can reduce their liabilities to consumers. NAF marketing letters also promise to limit the consumer's recovery to the original claim, to limit consumers to "little or no discovery," and not to issue injunctive relief. The brief also shows how NAF argues that past NAF actions and the past employment history of NAF personnel also display pro-creditor bias.

There is no question that NAF is biased in favor of creditors, and thereby is biased in favor of Respondent. The fact of NAF's bias, unrevealed to Claimant, calls into question the other arbitrators as well. Claimant will have no chance of a fair hearing before NAF's insidious Kangaroo Court, nor any other arbitrator designated by Respondent, as the result for Respondent is nothing more than predetermined.

CONCULSION

15 U.S.C §1692i supports Samadi's statements as to the jurisdictional issues are within this Court and not the Delaware Courts. In § 1692i. Legal actions by debt collectors
Release date: 2005-08-01 addresses:

(a) **Venue**

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity—

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

issue of arbitration.

Finally, Mr. Will Lund, Director of Maine's Office of Consumer Credit Regulation says:

"Mandatory arbitration clauses have consumers signing away the right to sue'

THERFORE, whether the issues is Jurisdictional of this Court as to the Appeal process alone, that the Court has the venue question as to Georgia, or the enforceability of the arbitration, Samadi respectfully feels and believes these issues should be resolved in his favor and to be consistent with other Circuit Courts and the Supreme Court of United States.

APPENDIX 3.

IN THE UNTIED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 05-14387-1

MIKE H. SAMADI
APPELLANT/PLAINTIFF
v.
MBNA AMERICA, INC.
APPELLEE/DEFENDANT

MEMORANDUM BRIEF OF PETITIONER-APPELLANT

The Petitioner-Appellant, Mike Samadi (hereinafter referred to as Appellant), Pro Se, hereby submits this Memorandum Brief pursuant to this Court's brief notice of October 18, 2005.

STATEMENT OF ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a)(2)(C), the Petitioner submits Oral Arguments are required. Petitioner is pro se and the facts and legal arguments may not be adequately presented in the briefs and records, and this Court's decisional process may be significantly aided by oral arguments.

STATEMENT OF ISSUES

1. Whether the District Court properly dismissed Petitioner's Civil Action which was a complaint filed under the **Fair Debt Collection Practice Act** (15 U.S.C. §1692c***) as amended by Public Law 104-208, 110 Stat. 3009*** hereafter "FDCPA" §§ 801 thru 818, 15 U.S.C. 1692a, et seq, 12 C.F.R. § 226.4, **Consumer Credit Protection Act** (15 U.S.C. § 1601 et seq.)**, Fair Credit Reporting Act** hereafter "FCRA", 15 U.S.C. § 1681 et seq., FCRA Sections 601 thru 625; as well as, the **Georgia Fair Credit Extension Act** and

Consumer Credit Protection Act (CCPA) Public Law 90-321, 82 Stat. 146, et seq.), 15 U.S.C. § 1692i, and other Acts as stated within the original complaint (Rec. Doc. no. 1).

2. Whether this Federal Court lacked jurisdiction over the subject matter of the complaint and claims for relief under 15 U.S.C. § 1692i, 15 U.S.C. § 1692k, 15 U.S.C. §1692a, et seq, 12 C.F.R. §226.4, 15 U.S.C. § 1601 et seq, 15 U.S.C. § 1681 et seq., FCRA Sections 601 thru 625 and others as stated in Paragraph numerated 1 (above) and the issues raised within the original complaint.

3. If and only if the arbitration clause of the Amended Agreement between MBNA and Samadi (parties herein) were binding (even though Samadi did not receive such Amended Agreement), does the authority of the Courts transfer to an arbitrator who cannot arbitrate in matters regarding Fair Credit Reporting Act and Fair Debt Collection Practice Act, et seq.?

4. Whether the Federal Court lacks jurisdiction over this subject matter when Appellee argues that this is a subject matter for the Delaware Courts.

STATEMENT OF CASE AND FACTS

On August 24, 2004, Appellant petitioned the United States District Court for Southern District of Georgia, Augusta Division for a declaratory judgment pursuant to **Fair Debt Collection Practice Act *as amended by Public Law 104-208, 110 Stat. 3009*** hereafter "FDCPA" §§ 801 thru 818, 15 U.S.C. 1692a, et seq, 12 C.F.R. 226.4, **Consumer Credit Protection Act** (15 U.S.C. 1601 et seq.), **Fair Credit Reporting Act** hereafter "FCRA", 15 U.S.C. § 1681 et seq. Defendant (hereinafter Appellee or MBNA) answered the complaint[1 &2] after its request for additional time from the Appellant and as a result proceedings of this matter began.

By the Order of District Court, parties initiated the proceedings and discovery process. Time for such discovery was extended between the parties as the MBNA claimed that it did not receive Samadi's request for production of document and interrogatories. Appellant also did not receive one of the Appellee's request or motion; therefore, the time was extended.

However, the day before Appellee's deadline to respond to Appellant Interrogatories, Production of Document and Request for Admission, Appellee filed a Motion to Compel Arbitration and Stay Proceedings. The Clerk of the Court immediately sets a hearing for a few days thereafter and contacts Appellant by phone that Friday at 4:30 PM, leaving a message with the date and time of said hearing. Appellant was not clear as to the reason for emergency hearing and seemed puzzled, therefore had no time to respond since:

A. Not only appellant did not receive any motions, notice of motions and any document as to the reason for the hearing,

B. The time frame to reply to such motion was not enough for the Appellant to research and prepare reply,

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Footnote

The complaint filed with the Dist. Court (Rec. Doc. no. 1) was extensive and detailed the issues of claims which arose as a result of Appellee's violation of Fed. Laws noted above as well as deceptive business practices, fraud, etc.

The Complaint also listed other defendants who through time, settled the matter with the Petitioner and by joint motions between Plaintiff and second party Defendants, were released from this claim.

C. Samadi, was faced with issues of his father's cancer and his mother's illness.

The Sunday after receiving the call from the Clerk's Office for the hearing, Samadi receives a call from Appellee's attorney who discussed the reason for the hearing. In that conversation, the attorney first states that a Motion to Compel Arbitration and Stay Proceedings was filed and that it has an attachment which is an affidavit of one of MBNA's Vice President. He continued that the affidavit states a notice was mailed to Samadi through a third party by method of mass mailing. Then, he stated that attached to the affidavit is an exhibit (Amended Agreement to the Original Agreement between Samadi and MBNA). He stated, MBNA forwarded this Amended Agreement to Samadi **through a third party mail processing contractor**[3]. Meanwhile, the attorney admitted that it is not unusual not to receive the proceedings (as he claimed that he did not receive the Appellant's discovery documents sent out to him previously) and similarly that Samadi did not receive Appellee's proceedings. Yet, the attorney wished Samadi to accept the fact that at some time in early 2000, Samadi received the said Amendment. During this conversation, Samadi argued, *"how would it be possible that we did not receive copies of each other's proceedings in this action (which are as a result of direct communications between us [Plaintiff and Defendant]), yet you wish to persuade me that some time ago a **one time notice** was sent out and I am bound by the terms of the notice and the Amended Agreement thereof (which was not received)"*. Samadi further argued that as the records of relationship between him and the MBNA shows, there were several occasions that documents or statements were not received and that he repeatedly requested for such.

Therefore, for the hearing of Motion to Compel Arbitration, the issues in which Samadi presented before the Honorable Magistrate Judge Court were as follows:

1. Defendant had not provided any verification that such

Footnotes:

3. In that Amended Agreement that presumingly mailed to Samadi through some third party mass mailing was a clause that in cases that the parties can not resolve their issues, the issues should be presented to an arbitrator. Exhibit 1 of Rec. Doc. no. 17, 19 (attachment to Affidavit of Margaret Simpkins (V.P. Of MBNA Appellee)

notice of Amended Agreement was actually, really and sincerely mailed out.

2. That Samadi received such notice of Amended Agreement.

3. If so and the Amended Agreement was in place and binding between the parties herein, why did MBNA (itself) not attempt to arbitrate (as it did in many other cases in which the debtors accounts were delinquent) as the case of Samadi or Johnny Hollis herein.

4. Why did MBNA sell an account of over Thirteen Thousand Dollars ($13,000.00+) to an outside collection agency for pennies instead of pursuing its in house collection and arbitration?

5. Why did MBNA not immediately file a motion to compel arbitration along with it initial answer to the complaint or immediately thereafter, nor it did so throughout this proceedings and wait until the day before its responses (to Plaintiffs' discovery, production of Documents and request for Admission) was due and filed its motion to Stay and Compel Arbitration.

6. MBNA and the District Court did not allow Appellant any opportunity to cross-examine the only witness MBNA presented (who stated that an Amended Agreement was sent to Samadi).

7. When the issues of a dispute regards Fair Credit Reporting Act, etc. and violations thereof, the Court have jurisdiction to review and adjudicate over such issues and the arbitrators do not have such authority.

8. During the hearing of June 1, 2005, Samadi even presented the argument in such manner that involved the Magistrate Court's own experience in credit card transactions and communications. As noted in the transcript of the hearing, Samadi stated and asked:

> *"It sounds like, I sent a letter to Your Honor and said, 'if you do not respond to this letter, you agree to all the terms and conditions of this agreement that I'm attaching to this letter', and two days later, I start garnishing your honor's wages or putting liens just because Your Honor---I claim I sent it, but Your Honor never received it."* Transcript (Rec. Doc. no. ?) pg 23, ln 15 thru. 23.

9. Samadi presented cases in which opinion of the Court of Appeals and the Supreme Court affirmed decisions that Arbitration was unfair, unconscionable and not enforceable.

10. Samadi requested that the Affidavit of Margaret Simpkins (V.P. of MBNA) and its related Exhibit 1 and 2 be stricken from the records because, the witness was not present to answer questions and that there was not enough time to perform discovery from this witness. After the hearing Samadi immediately presented his motion in writing to the Court (Doc. no 22).

MBNA argued that any litigation must be submitted to the Delaware Courts. However, Congress and the Supreme Court made it clear that Federal Courts hold jurisdiction over subject matters. The Federal Court's jurisdiction extends in this matter when the solicitation and offers where made in State of Georgia. Moreover, the Appellant has been resident of Georgia since MBNA extended credit to him and that Appellant has no ties to the state of Delaware.

11. Furthermore, Appellee holds offices and does business through interstate commerce and internationally and has registered agents in all states and territories of the United States and foreign countries.

Appellee further argued that it did not violate any laws nor did it commit any act of deceptive practices or fraud. Appellant provided evidence of said fraud and deceptive practices with the original complaint (Rec. Doc. no. 1) and continued in doing so throughout this litigation.

ARGUMENTS

This Court reviews issues of law in the District Court's denial and relief under arbitration.

COUNT I
DIVERSITY OF CITIZENSHIP FOR LITIGATION

First MBNA claimed that pursuant to the original agreement between the Appellant and Appellee all dispute must be resolved in the Delaware Court. However, in this matter diversity of citizenship applies, *see* 8 U.S.C. § 1332. Appellant is a citizen of State of Georgia, one who entered into the original agreement with MBNA. The jurisdiction is within this Court as follows:

A. Appellant has no ties to the State of Delaware, Appellant is an individual with no interstate ties. Appellee on the other hand

does business interstate and internationally and holds office in the state of Georgia where Appellant resides.

B. The contract between Samadi and MBNA was solicited by MBNA in Appellant's home State of Georgia when MBNA contacted Samadi at his home and forwarded solicitation offers to his home address through mail. Therefore, the jurisdiction squarely falls in Georgia.

C. Samadi did not receive the original agreement until weeks after he transferred balance (based upon MBNA's recommendation) and charged the credit card given to him. Therefore, if any part of such Agreement was to be enforced and valid, due to MBNA own negligence by not providing the Agreement prior to allowing the usage of credit card, the terms of agreement to the extent that disputes and litigation must take place in Delaware should be null and voided.

D. Even if the terms of Agreement was to be enforced that litigations must be directed to the Delaware Court, when the verbal agreement at the time the solicitation was accepted, but MBNA itself did not provide this particular term of agreement when it was soliciting the card or providing offers in regards to the card. In fact, as of today MBNA uses solicitation method in order to expand its credit to consumers; however, does NOT provide all the terms of the Agreement (specially issues relating to how disputes must be resolved).

E. The Agreement between Samadi and MBNA in 1996 was not entered in Delaware, but Georgia. MBNA claims the contract implies to Delaware Laws. However, MBNA's phone solicitation, and the offer thereafter were made only in Georgia. This is on grounds of diversity of citizenship and examination of the Georgia law, reviles that arbitration is a matter of consent and not coercive actions (as stated by Court of appeals and the Supreme Court). See *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 211, n. 5 (1956) (Frankfurter, J., concurring). In that, the Court reversed the Court of Appeals for the Second Circuit and remanded the matter to the District Court of Vermont, where that Court ruled that arbitration provision of the contract was governed by Vermont law.

F. **Finally, as mandated by congress and held by the U.S. Supreme Court, the Federal Circuit Courts have exclusive jurisdiction over appeals from all United States District Court.**

COUNT II
ARBITRATION ISSUES

An agreement between parties binds parties to perform specific tasks as to the terms of agreement. Although most agreements require all parties signature, however, in case of credit card, such agreement becomes verbal as a cardholder uses the credit card issued to him/her. However, when party to this agreement claims that at such later date, an amendment to the Agreement was made, such amendment must be presented to the other party in a manner which the party can acknowledge its receipt or that at minimum further notification should be required and the concept should not be coerced in accepting such agreement (as it occurred in this matter).

When Appellant was released (Rec. Doc. No.1, Exhibit H), he attempted to contact all his creditors whom he had similar issues (as MBNA). Among those other creditors were Discover Card, American Express (in which Samadi held two accounts), a group of Mortgage note holders and a list of other bill collectors. When Samadi initiated his communications with all these creditors and collection companies, every one of these (except MBNA) agreed to the terms of the agreement that was acknowledge between the Appellant and the creditor (EXCEPT MBNA).

Prior to this Civil Action, MBNA received numerous letters and verbal communications from Samadi [(Rec. Doc. no. 1), Exhibit I, all pages of Exhibit J and exhibit O)] to address and correct dispute or formally and in good faith investigate the matter before reporting unfairly. However, **MBNA refused**. Even the day before filing his complaint, Samadi contacted MBNA and was advised, *"our record shows that you intend to litigate"* **yet, MBNA took no action**.

What does not make any sense is the fact that MBNA acknowledged cardholders (Samadi and Hollis) will pursue litigation, yet did not take any initiative to reduce its own headache, expenses and save its reputation by communicate with Samadi and perform a fair investigation or cooperate with Samadi. MBNA never made any statement to Samadi that by the terms of our agreement you are bound to arbitrate and cannot litigate. Nor did MBNA take any initiative or set forth a step to resolve a single issue that could and would have satisfied all parties. Instead, it chose to ignore and allowed Appellant to litigate. It chose to pay cost of litigation

(attorneys fees) and when it was forced to admit to its mistakes, used trickery and fraud, and on a day before presenting its responses to Appellants' demand for discoveries, MBNA files a motion to arbitrate.

Appellant disagreed and condemned Appellee's actions. MBNA is not entitled to arbitration. MBNA forged its rights to arbitrate for the following reasons:

1. The terms of Amended Agreement are not binding as no proof of delivery has been provided.

2. The terms of Amended Agreement are not binding since MBNA and the District Court deprived Appellant's rights to cross-examine MBNA's only witness. Yet, the District Court bluntly ignored Appellant's request and Motion to Strike Affidavit of MBNA's witness and the attached supporting document.

3. If arbitration was valid and enforceable, it would not be valid nor enforceable since MBNA (itself) did not take the initiative to properly

A. Investigate Appellant's claim pre-litigation when repeated opportunity was given to it;

B. Although MBNA acknowledged that Samadi is planning to litigate; however, it never responded nor stated to Samadi that his only alternative to MBNA's counter measure would be through arbitration;

C. MBNA never acknowledged Arbitration clause between the parties existed;

D. MBNA was well aware of Samadi's financial affairs at that time as it was frequently and routinely obtaining Samadi's credit report and repeatedly noticed Samadi held several mortgage loans. Therefore, it would have been to the best interest of MBNA to Arbitrate when the account defaulted. But because MBNA did not believe nor was informed of its own arbitration terms, decided to discount the account to a collection agency when it could have claimed the entire balance from Samadi easily.

E. Samadi has not been able to afford Arbitration Fees and expenses since this litigation began.

F. Last but not least, if MBNA acknowledged the terms of its agreement, why did it wait until the day which it was required by law to respond to Appellant discoveries and moved the Court to Compel Arbitration. MBNA had plenty

of time and opportunity to do so. However, use a trickery and surprise tactic was its **last-ditch effort** while conspired and violated Appellant' rights to discovery even in a matter regarding its witness when it filed it Motion to Compel, in order to obtain a ruling in its favor.

The Arbitration of this matter is not enforceable because, 15 U.S.C. § 1692 and 15 U.S.C. § 1681 (in its entirety) which do not allow arbitration. See ***Linda Johnson v. MBNA et el***. CA 4th, Case no 03-1235, 2/11/04 Opinioned:

> *"MBNA America Bank, N.A. (MBNA) appeals a judgment entered against it following a jury verdict in favor of Linda Johnson in her action alleging that MBNA violated a provision of the Fair Credit Reporting Act (FCRA), see 15 U.S.C.A. § 1681s-2(b)(1) (West 1998)(amended Dec. 4, 2003), by failing to conduct a reasonable investigation of Johnson's dispute concerning an MBNA account appearing on her credit report. Finding no reversible error, we affirm."* Also *see* re Green Tree Financial Corp.-Alabama et al. v. Randolph opinion of the 11th Cir.

Arbitration is a matter of consent, contract and not **coercion**. See *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468. *See also* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57, 131 L. Ed. 2d 76, 84, 115 S. Ct. 1212, 1216 (1995) (quoting *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 103 L. Ed. 2d 488, 500, 109 S. Ct. 1248, 1256 (1989)) stating, **"arbitration under the Federal Arbitration Act is a matter of 'consent, not coercion'"**. MBNA claims that it sent an Amended Agreement to Samadi in early 2000 **through a third part mailing yet, did not provide any proof**. It further claims that Samadi had an opportunity to opt-out. Samadi never received such Amended Agreement; therefore, was not aware and could have not opted-out (even if he wanted to). In its last attempt to support its claim, MBNA does not even provide any third party affidavit or records supporting its claim, but an affidavit of its own officer, which her conduct will directly be affected by the outcome of the Court. See *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 211, n. 5. In that, the Court stated, *"the agreement to arbitrate was revocable any time before an award was actually made."*

MBNA wishes the Court to accept that such affidavit and conspired act must be accepted, even if **Appellant was stripped of his rights and opportunity cross-examine the validity of the Affidavit**. MBNA deprived Appellant from cross-examining its witness and the court moved so quickly to hear the matter and dismiss the case. Title 42, Chapter 21, Sub Chapter **§ 1983**, describes the civil action for deprivation of rights *(Release date: 2005-02-2)*. In *Lytle v. Citifinancial Services, Inc.*, 810 A.2d 643 (Pa.Super.Ct.2002), the Court held,

> *"a presumption of unconscionability arises where one party **'reserves sole access to the courts.'** The presumption can be rebutted by a showing of 'business realities' that compel the lack of mutuality."*

Furthermore, when MBNA filed its Motion to Compel Arbitration, Samadi responded by his objection to such motion and presented arguments and holding of Courts such as Court of Appeals, the Supreme Courts of States of California and Arizona along with the decisions of the Supreme Court of United States. Although during the speedy hearing for MBNA's Motion to Compel, MBNA stated that Samadi's objection may have not fell within the time period as allowed by law; however, MBNA did not object to Samadi's motion and objection to its compel for arbitration. Nor did MBNA requested for Samadi's Motion to be stricken from the records. **Therefore, Samadi's objection to MBNA's Motion to Compel MUST be enforced.**

Moreover, immediately after the hearing, Samadi filed his written Motion to Strike Defendant's Witness's affidavit and its supporting documents. This Motion was filed consistent with Samadi's Oral Objection during the hearing. MBNA again did not object nor argued.

Yet, the District Court assumed the Affidavit of MBNA's witness (an officer of the company which at minimum is bias) as a guideline or a bible and issued an Order dismissing the matter by referring the matter to Arbitration. Of course such witness would not state otherwise when her own personal interest is at stake by the outcome of the Courts in this Action.

As stated above, Arbitration is a matter of contract and consent. However, MBNA wished to present that parties agreed to arbitration by the mere fact that Samadi must have received the Amended Agreement, and that even if Samadi did not receive the

amendment, therefore he should have received it because MBNA says so. The District Court argued that because a party to the complaint states that we mailed it through a third party which use regular mail delivery, therefore, Samadi is liable. Arbitration isn't binding, because parties never agreed.

The dispute in regards to arbitration is very clear. Arbitration process provides no jurisdiction in regards to most of the subject matters of this litigation. See *First Options of Chicago, Inc. v. Kaplan, et al* 514 U.S. 938, 943, 131 L. Ed. 2d 985, 993, 115 S. Ct. 1920, 1924 (1995) (emphasis added). Which states, arbitration is a "matter of contract". (Certiorari to the United States Court of Appeals for the Third Circuit {No. 94-560}, [Argued March 22, 1995 -- Decided May 22, 1995]. The US Supreme Court Affirmed by stating;

> *"The arbitrators decided that they had the power to rule on the dispute's merits and ruled in First Options' favor. The District Court confirmed the award, but the Court of Appeals reversed. In finding that the dispute was not arbitrable, the Court of Appeals said that* ***courts should independently decide whether an arbitration panel has jurisdiction over a dispute****, and that it would apply ordinary standards of review when considering the District Court's denial of respondents' motion to vacate the arbitration award."*

Unlike other credit card companies whose notices were mailed properly and then their monthly statement also reflected that such notice for Amended Agreement or Arbitration was sent out, MBNA did not provide any statement (except in this litigation, claim of the Affidavit). Unlike any other creditor in which cooperated and investigated the matters in order to resolve Appellants' disputes, MBNA is the only creditor that did not.

At the time that Samadi was in communication with MBNA (pre-litigation), he was also in contact with Discover, American Express and list of other creditors. The only creditor that chose to sell its account at a large discount was MBNA. MBNA was the only creditor that did not wish to arbitrate pre-litigation. All other creditors were forced to resolve the issues and therefore, no litigation or arbitration resulted from any of those other accounts. The fact that MBNA sold the account and did not wish to arbitrate pre-sell is a clear indication that MBNA itself did not believe in the terms of its

amended agreement, that it knew the terms of its agreement was not sent out nor would be enforceable.

There is no logical reasoning that a company as large as MBNA would sell the account that was in default for a short time (approximately 5 months) and not arbitrate unless it knew that the terms of its Amended Agreement was not binding or that such agreement was not sent out. Otherwise, MBNA should have been able to prove at least one fact. MBNA should be able to present that other notices were posted in Samadi's statements, that some record of conversation existed between Samadi and MBNA which showed either of the two card holder were informed that such arbitration clause between the parties existed.

Throughout the years that Samadi held account with MBNA, Samadi was in contact with MBNA in regards to host of issues. These issues were discussed in the original complaint (Rec. Doc. no.1) and Exhibits A through G thereof. Samadi frequently contacted MBNA and discussed the interest rate changes, late fee charges, over-limit fees or etc. Through the years, Samadi also contacted MBNA simply for informational purposes such as to inquire balance, verify finance rate, last payment received and other issues which did not require dispute. All these issues are noted on the pages Exhibits attached to Samadi's original complaint. None of these exhibits show even a simple verification or discussion regarding arbitration.

Should the Courts ignore the actual facts and all supporting documents thereof, and throw out the complaint only to accept the statement made by MBNA's own (officer that will be effected by the outcome of the Courts decision)? Should the Courts rely on unfounded allegations not supported by MBNA that this matter is subject to arbitration, when Appellant's right to cross-examine in proceedings before a court of law was violated?

COUNT III
ADDITIONAL CARD HOLDER IS NOT SUBJECT TO ARBITRATION

MBNA claims, Johnny Hollis joined the account and became the secondary Card Holder. However, he never was given a copy of the original nor amended agreement. MBNA claims that a third party company sent the amended agreement to Samadi. Although, MBNA did not provide any evidence nor support from the third

party companies; however, it did not mention anything about the second card holder. This raises two issues:

A. No agreement or arbitration clause was ever presented to Hollis.

B. MBNA claimed Hollis was a secondary cardholder; however did not pursue collection or arbitration against Hollis either.

In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, in which the Supreme Court affirmed the decision of the Court of Appeals of California. In that case, the litigation regarded between a party to the arbitration agreement and third parties not bound by it. The State Court of Appeal affirmed, holding that (1) by specifying that the contract would be governed by "the law of the place where the Project is located," the choice-of-law clause incorporated the California rules of arbitration and (2) application of 1281.2(c) was not pre-empted by the Federal Arbitration Act (FAA or Act), even though the contract involved interstate commerce. The Supreme Court affirmed and stated;

> *"1. The Court of Appeal's conclusion that the parties intended the choice-of-law clause to incorporate the California arbitration rules into their arbitration agreement is a question of state law, which this Court will not set aside. Pp. 474-476.*
> *2. The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. Moreover, since the FAA's principal purpose is to ensure that private arbitration agreements are enforced according to their terms, it cannot be said that application of 1281.2(c) here would undermine the Act's goals and policies. Arbitration under the Act is a matter of consent, not coercion, and the parties are generally free to structure their arbitration agreements as they see fit."*

COUNT IV
CLAIMS OF FINANCE CHARGES AND FEES

TILA regulates, *inter alia*, the substance and form of disclosures that creditors offering "open end consumer credit plans" (a term that includes credit card accounts) must make to consumers, §1637(a), and provides a civil remedy for consumers who suffer damages as a result of a creditor's failure to comply with TILA's provisions, §1640. When a creditor and a consumer enter into an open-end consumer credit plan, the creditor is required to provide to the consumer a statement for each billing cycle for which there is an outstanding balance due §1637(b). The statement must include the account's outstanding balance at the end of the billing period,

§1637(b)(8), and "[t]he amount of any finance charge added to the account during the period, itemized to show the amounts, if any, due to the application of percentage rates and the amount, if any, imposed as a minimum or fixed charge," §1637(b)(4). A "finance charge" is an amount "payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." §1605(a). The Board has interpreted this definition to exclude "[c]harges ... for exceeding a credit limit." See 12 CFR § 2264(c)(2) (2004) (Regulation Z). Thus, although respondent's billing statement disclosed the imposition of an over-limit fee when he exceeded his credit limit, consistent with Regulation Z, the amount was not included as part of the "finance charge."

The US Supreme Court stated,

> *"As our prior discussion indicates, the best interpretation of the term "finance charge" may exclude over-limit fees. But §1605(a) is, at best, ambiguous, because neither §1605(a) nor its surrounding provisions provides a clear answer. While we acknowledge that there may be some fees not explicitly addressed by §1605(a)'s definition of "finance charge" but which are unambiguously included in or excluded by that definition, over-limit fees are not such fees".*

In *Andrew Gale v. Hyde park Bank*, 7th Cir., 09/17/2004. The Court dismissed the District Court's judgment and remanded the case for further proceeding under 1693f.

CONCLUSION

Arbitration is not valid in this matter. MBNA used trickery, deceptive and fraudulent method by stating that parties are subject to arbitration. In *Rodriguez v. D'Ambrosio*, 2004 WL 2955910, according to the Second District of the California Court of Appeals, *"both the party to be bound to arbitration and the party seeking arbitration* ***must have signed the arbitration agreement for it to be enforceable.***"

In *Gerdesmeier v. Sutherland*, A03-07, the Minnesota Supreme Court refused to enforce an arbitration provision contained in an automobile insurance policy

In Demasse v. ITT Corp., 194 Ariz. 500, 984 P.2d 1138 (S. Ct. 1999). The Court noted that *"[n]othing could be more illusory" than to allow a party to unilaterally amend a contract based on a provision such as the one in the handbook. Id. at 508,984 P.2d at 1146.* The court elaborated with reasoning equally applicable here:

> *"We do not agree that a party to a contract containing a term that proves to be inconvenient, uneconomic, or unpleasant should have the right, like an administrative agency, to change the rules prospectively through proper procedures . . . . Self-interest may certainly provide a party with a legitimate business reason to request assent to a contract change, but the law has never before permitted unilateral change or excused non-performance of a contract on such a ground."*

In Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1179 (9th Cir. 2003), the Court held

> *("[W]e conclude that the provision affording Circuit City the unilateral power to terminate or modify the contract is substantively unconscionable."*

In Dumais v. Am. Golf Corp., 299 F.3d 1216, 1219 (10th Cir. 2002) *("We join other circuits in holding that an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory.")*;

In Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 316 (6th Cir. 2000) "defendant's right to alter arbitration provision unilaterally 'renders its promise illusory'; agreement did not therefore 'constitute an enforceable arbitration agreement'", cert. denied, 531 U.S. 1072, 148 L. Ed. 2d 664, 121 S. Ct. 763 (2001).

In the case of Central Green Co., Petitioner v. United States, No. 99—859, On writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, the Supreme Court of the United States reversed Opinion of the Court of Appeal in February 21, 2001, holding that;

> *"For present purposes, we merely hold that it was error to grant the Government's motion for judgment on the pleadings and that it is the text of §702c, as informed by our holding in James, rather than the broad dictum in that opinion, that governs the scope of the United States' immunity from liability for damage caused "by floods or*

flood waters." Accordingly, in determining whether §702c immunity attaches, courts should consider the character of the waters that cause the relevant damage rather than the relation between that damage and a flood control project"

In that context it will be an err to interpret that just because MBNA claims that an amendment is sent through third party without any verification or proof thereof, Samadi must have received it, immunning MBNA from this litigation.

In this litigation, Appellant is not just addressing the issues of contractual losses, but the discriminations and deceptive reporting of derogatory upon ones credit report in violation of the Fair Credit Reporting Act and Consumer Credit Protection Act as wells as other acts relating to proper reporting (especially when an individual sustains legal and physical disabilities). Even if arbitration was enforceable, yet the Supreme Court of the United States factors out the circumstance as it stated the following:

In *Karen Livadas, Petitioner v. Victoria Bradshaw, California Labor Commissioner*, on writ of certiorari to the United States Court of Appeals for the Ninth Circuit, No. 92-1920 [June 13, 1994]. The Supreme Court Stated:

"We conclude, was not intended by Congress, see infra, and cannot ultimately be reconciled with a statutory scheme premised on the centrality of the right to bargain collectively and the desirability of resolving contract disputes through arbitration."

In *Digital Equipment Corporation, Petitioner v. Desktop Direct, Inc.*, Certiorari to the United States Court of Appeals for the Tenth Cir., No. 93-405, Argued February 22, 1994, June 6, 1994, The U.S. Supreme Court affirmed 10th Cir. Crt. of Appeals. In that, the Court dismissed arbitration and held:

"Nor are we swayed by Digital's ***last-ditch effort*** *to come within Cohen's sense of 'importance' by trying to show that settlement-agreement 'immunities' merit first-class treatment for purposes of collateral order appeal, because they advance the public policy favoring voluntary resolution of disputes. It defies common sense to maintain that parties' readiness to settle will be significantly dampened (or the corresponding public interest impaired) by a rule that a district court's decision to let*

allegedly barred litigation go forward may be challenged as a matter of right only on appeal from a judgment for the plaintiff's favor. "

See also *Powell v. McCormack*, 395 U.S. 486

This case is similar to ***Linda Johnson v. MBNA***, where in *Johnson* only one of the issue of Samadi's disputes was addressed. In *Johnson*, the issue only regarded to Finance Charges of over limit fees; however, Appellant have several fees and finance charge disputes along with the most important issue regarding Fair Credit Reporting and Fair Debt Collection Practice Acts.

This case is significantly different from common arbitration. The independent reviewer has no free-ranging power to construe contract terms especially when the FCRA and FDCPA along with range of other violations (as stated in the original complaint) occurs. See *Rush Prudential HMO, Inc. v. Morgan et al*, U.S. (No. 00-1021), (2002). The arbitration is unenforceable since arbitration can not resolve issues relating to:

1. Violation of the FCRA, FDCPA and other Acts relating to Consumer Credit Protections are not a matter that an arbitral can decide or have jurisdiction;

2. Deceptive Business Practices;

3. 1693 f does not require this matter to be arbitrated.

4. Unfair business practice violations, *see in re Washington Mutual Bank v. Superior Court* decided in the California Supreme court (Opinion No. S070418 Date Filed: January 25, 2001).

Appellant does not wish to be redundant from the arguments provided in the Motion to Object Arbitration (Rec. Doc. no. 22). Therefore, he prays that this Court will review Appellant's Objection to Arbitration and note the citations of other Court of Appeals, the State Supreme Courts and the holding of the United States Supreme Court.

WHEREFORE, Appellant prays that this Court will grant an opportunity for Oral Argument;

dismiss the arbitration clause and reverse the Order of the District Court and allow this matter be presented before a Jury as it was requested in the Original Complaint.

Respectfully Submitted

Mike H. Samadi, pro se, Appellant

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Evans, GA 30809
(706) 364-0555

APPENDIX 4.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MIKE H. SAMADI, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CV-104-137
	)	
MBNA AMERICA BANK, N.A.	)	
	)	
DEFENDANT.	)	

ORDER

After it careful, de novo review of the file, the Courtconcurs with the magistrate Judge's Report and Recommendation to which objections have been filed. Accordingly, the report and Recommendation of the Magistrate Judge is A**DOPTED** as the opinion of the Court. Therefore, MBNA's motion to compel arbitration and to stay these proceedings is **GRANTED IN PART AND DENIED IN PART,** the instant case is dismissed without prejudice, Samadi's motion for injunctive relief and to strike MBNA's "Affidavit and Exhibits" are **DENIED**, and MBNA's motion for protective order is **DENIED** as **MOOT**.

SO ORDERED this 8th Day of July, 2005.

s/ Honoranle Anthony A. Alaimo, Judge

ANTHONY A. ALAIMO, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX 5.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MIKE H. SAMADI, JOHNNY HOLLIS, JR., Plaintiff,	)	CIVIL ACTION NO.:
v.	)	
MBNA AMERICA BANK, N.A.	)	CV104-137
Defendant.	)	

PLAINTIFF'S OBJECTION TO THE
REPORT AND RECOMMENDATION

COME NOW, Mike Samadi, pro se Plaintiff and respectfully objects to the Report and Recommendation of the Order as to the matter of MBNA's Motion to Compel Arbitration. Plaintiff presents his objection as a result of the discussion and arguments the Court presented in support of the Defendant (MBNA). Samadi respectfully shows the Court discarded his Motion to Strike Defendant's Affidavit which hampered his entire defense and cross examination for the purpose of the hearing set forth due to MBNA's Motion to Compel Arbitration. Samadi further presents the Court showed prejudice and was bias during the hearing and thereafter when preparing the Report.

ARGUMENTS AND FACTS

1. Ms. Simpkins, Vice President of MBNA, presented an affidavit which did not include her address, business or residence phone number in violation of the rules regarding Affidavit. To add insult to injury she was not present during the hearing to resolve any issues or questions that the Plaintiff had. During the hearing Samadi verbally requested that her *"affidavit and exhibits be stricken due to her absence to answer nearly seventy question"* which Samadi had.

2. Shortly after Plaintiff became aware of the content of MBNA's Motion to Compel Arbitration (May , 2005 which is also the day that Plaintiff's demand for discovery were due), a hearing is set, not even giving Plaintiff the opportunity to perform deposition from the author of the Affidavit (Ms. Simpkins). In fact, Samadi learned about the hearing before he knew what the hearing was about. As discussed in his Objection to MBNA's Motion to Compel (rec. doc. no. 22), Samadi was in the doctor's office (5:20 PM of Friday May 6, 2005) when he received his message from the Clerk of the Court stating a hearing was set for May 18. However, Samadi was confused as to the nature of the meeting until May 9 when he received MBNA's Motions. Neither that date nor the actual hearing date of June 1, 2005 would have given Samadi any opportunities to call upon a deposition of Simpkins

3. In her affidavit, she stated that through a third party companies (with an unclear assignment), one of these third party companies presuming forwarded the Amended Agreement to Samadi's address. Samadi argued that he did not receive the Amended Agreement. The Court did not consider Samadi's facts NOR any citation of the Court of Appeals or Supreme Court in regards to the invalidation of the Amended Agreement. If and only if the Court would have noticed that several of the Exhibits provided during the original complaint are not actually copies of the original statements that MBNA forwarded to Samadi. In fact, some of the Exhibits (which are copies of statements) are actually copies of statements that MBNA forwarded to Samadi; because, Samadi did not receive the actual statement. The Court argued on behalf of MBNA and cited Delaware Supreme Court and Washington District Court relying on Edelist , that Arbitration is enforceable whether Samadi received the Amended Agreement or NOT. Then, the Court extended its discussion by citing Marsh v. First USA Bank, N.A., 103F. Supp.2d 909, 918 (N.D. Tex 2000) and the 11th Circuit Court. In doing so, the Court ignored several facts:

A. Citation of Supreme Courts of Arizona, California and others that Samadi presented and argued in his Objection to MBNA's Motion to Compel;

B. Citation of Federal Court of Appeals and even the Supreme Court of the United States that held arbitration is unfair or unconscionable;

C. The fact that Simpkins was not present to answer "*nearly seventy*" questions that Samadi had (as Samadi stated during the oral hearing and immediately followed it with a written Motion to Strike);

D. Since Samadi was not allowed to ask the only witness in this matter (Simpkins) any questions relating to the number of times that Samadi contacted MBNA to request for statements because such statements did not arrive or many other issues directly relevant to this litigation and issues of arbitration;

E. Yet, to resolve any inconsistencies, in his Objection to MBNA's Compel, during the hearing and even in his written Motion to Strike Affidavit, Samadi presented the fact that even during the most recent communications with MBNA's Counsel, Samadi had to raise the issue that the Counsel did not forward MBNA's discovery to Samadi. During his defense, Samadi addressed a communication which took place between him and Mr. Taube in regards to MBNA's request for Production of Documents and other discovery items (in which MBNA may have prepared). Samadi shared with the Court in writing and verbally that Samadi brought to the Counsel's attention that MBNA did not forward the discovery items and the counsel argued that he did and will forward again. Yet, the Court ignored all those facts that it would have been possible that the Amended Agreement may have not been received when several statements were not received nor MBNA's discovery;

F. While other courts held that any doubt must be resolved in favor of the card holder, this Court plainly believes that Samadi received or must prove the impossible that he in fact did not receive the Amended Agreement. The Court bluntly suspects Samadi's request for validation by stating; *"such burden of proof is not the law, for it would be virtually impossible in this era of mass-mailing to prove that any singular item of correspondence was in fact mailed."* Yet the Court concluded that Samadi **must have received** the item just because an absent witness through her affidavit stated that *"mass-mailed"* by MBNA or its contacting vendor was sent out and that **Samadi did not Opt-out** and **continued using the card**. **Of course, logic may not be**

required that if a person is not aware of Amendment then, how would he know to Opt-Out. It seems that Defendant or the Court expected Samadi to hold a crystal ball and make predictions;

G. The Court may have presumed that request for discovery by Samadi is invalid when relying on the "*Edelist*". It is very clear the Court did not wish to resolve any doubt in discovery nor the fair proceedings for discovery or hearing. In *Lemon v. U.S.* F. Supp.2d. 561 (D.N.Y. 1975) which held; "*Court would retain control over discovery process to prevent unjustified decision making process.*" However, it seems this Court does not care to address issues relating the absence of the author of affidavit, issues relating to the fact that Samadi may have a valid claim that in actuality he may have not received the Amendment or discovery.

4. During the hearing, the defense counsel was given all the time needed to present his argument and conclude without any disruption . However, when Samadi was to present his argument and cross examination, he was cut short by the Court.

DISCUSSION

To be fair and unbiased, in a hearing, parties must be given an equal opportunity to argue their issues, present their evidence and cross examine witnesses. However, in this case, Plaintiff was denied such right in two ways. First by not having the opportunity to cross examine or depose the author of the Affidavit whom claimed that the Amended Agreement was mass-mailed by third party. Second, the Court seemed to have been eager to end Samadi's argument and defense and made assertion during his defense.

Now to no surprise, the Court considered the mere possibility of Defendant's **claim** that it forwarded an Amended Agreement; therefore, it validates that the Amendment was **really** received by Plaintiff or if Samadi did not receive it, **"its too bad, so sad"**.

Meanwhile, the Court discarded Plaintiff's defense and especially Objection (Doc. No. 22, Pp. 2 through 6) when Samadi argued several facts. In Pp. 2 of his objection, Samadi argued one of the most important fact. The fact that if MBNA itself truly believed in its Amended Agreement and that if such Amendment was sent then, why would MBNA sell the account of over $13,000.00 to an outside collection agency for an amount much less, instead of

pursuing arbitration. Then, in the following paragraph, Samadi argued his history of communications with MBNA and presented that almost on a monthly basis Samadi would contact MBNA in regards to Rate, Finance Charges and Fees. These argument can simply be demonstrated by a review of the Exhibits that Samadi presented along with his original Complaint (Rec. doc. no. 1) where almost every page of statements show that Samadi was contacting MBNA and discussing or arguing one thing or another with MBNA representatives.

In Pp. 3 of (Rec. doc. no. 22), Samadi also presented that he would have sent a certified letter to MBNA if he was aware such Amendment ever existed. Again, Samadi demonstrates this issue through Exhibit F pgs. 1 and 2, Exhibit I, Exhibit J pgs. 4 thr. 6 and Exhibit J pgs. 7 thru. 9 along with many other documents that were prepared for discovery that Samadi from time to time would certify letters to executive offices of MBNA in regards to issues. However, the Court discarded any and all issues or concerns that Samadi has had and simply resolved the matter in favor of MBNA even without any sufficient evidence.

Moreover, the Court did not even consider the fact that MBNA (if itself truly believed in arbitration), why would it wait since it filed its Answer (in September 2004) and now request for arbitration. Ever since its Answer, the counsel for MBNA and Samadi communicated very frequently without any issues raised about arbitration. Most importantly, even in its discovery MBNA did not address the issue of arbitration. The only time MBNA even address arbitration (as it was not certain), was in paragraph 33 of its "Answer to Complaint". Yet, MBNA continued in its proceedings without any mention of arbitration until the day prior to which MBNA was to answer Plaintiffs' Production of Documents, Interrogatory and Defendant's Admission to Plaintiff (collectively "Discovery") (Monday, May 9, 2005). Because **MBNA knew that all its lack of credibility would be exposed; therefore, a day before submitting its responses to Plaintiffs' Discovery, it filed a motion to compel.** Samadi knowing the facts that MBNA would not be able to supports its denial of the facts and its claim, submitted a copy of all its documents for Discovery (Production, Interrogatory and Admission to Plaintiff) to the Court and the Clerk of the Court returned such documents back to Samadi after clocking the documents and then voiding the same. In Paragraph 38 of

PLAINTIFF'S FIRST INTERROGATORIES TO DEFENDANT, Samadi addressed the issue raised by MBNA relating to the arbitration as it was briefly mentioned in MBNA's Answer to the Complaint (pp.33). It is very clear that MBNA itself did not believe nor was aware of arbitration clause or the Amended Agreement. Otherwise, the following questions exists and must be answered:

A. Why would MBNA sell the account at such discounted value to an outside collection agency instead of arbitrating?

B. Why would MBNA not compel the Court along with its Answer or immediately thereafter and instead wait until nine (9) months later while filing many proceedings with this Court?

C. Why would MBNA wait until the day before presenting its responses to Plaintiffs' discovery and file its Motion to Compel so that it would avoid answering the discovery?

It can not be any clearer that MBNA credibility will be exposed by its responses to Plaintiffs Discovery. Meanwhile, the Court is denying Plaintiffs their fundamental rights.

In *Lemon v. U.S,* the court could have not been clearer when it held; "*Court would retain control over discovery process to prevent unjustified decision making process.*"

If Arbitration agreement was enforceable, then MBNA itself would have enforced it instead of selling the account. The Courts agreed. In that regards and repeating the citations of Plaintiff's objection (rec. doc. no. 22), Samadi presents;

Mastrobuono v. Shearson Lehman Hutton, Inc. , 514 U.S. 52, 57, 131 L.Ed.2d 76, 84, 115 S.Ct. 1212, 1216 (1995) (quoting *Volt Info. Sciences, Inc. V. Board of Trustee of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 103 L.Ed.2d. 488, 500, 109 S.Ct. 1248, 1256 (19889) which held *"arbitration under the federal Arbitration Act is a matter of 'consent, not coercion'"*. The matter before this Court simply contradicts the answer of the Supreme Court. As argued in previous proceedings and again in this, if MBNA had truly intended to make the Amended Agreement its basis of defense, then it should have appropriately forwarded it to Samadi, it should have requested for confirmation that such document was received, or at minimum, should have stated in its subsequent bill statements at minimum a sentence that arbitration or Amended Agreement was sent. MBNA did not take any measure to confirm, verify or support its most important change and clause of its agreement. Moreover,

MBNA did not immediately proceeded with request for arbitration when it received Samadi's complaint and waited nine (9) months later and the last day of discovery (in order not to be exposed) it pushed for arbitration. Moreover, the most important evidence provided (its witness, Ms. Simpkins does not appear in Court to support her affidavit and stand ready to answer question in Cross-examination. The entire attempt by MBNA is nothing more than "Coercion" as stated by the High Court.

Although the 11th Circuit Court held in favor of arbitration as opposed to litigation while other courts oppose arbitration, even the opinion of 11th circuit court is pending appeal in the Supreme Court of the United States. In saying that, this Court discarded holding of 9th Cir. In the matter of *Kyocera Corp. V. Prudential-Bache Trade Services, Inc., et el.* Along with the matter of ***Direct TV, Inc. V. Mattingly,*** 376 Md. 302, 321,829 A.2d 626,638 (2003), which held ***"we never reach the questions controlled by the [Federal Arbitration Act] because we hold that there was never a valid agreement to arbitrate..."***

A quick review of the *Sears Roebuck and Co. V. Barbara Avery* which was decided in the Supreme Court of North Carolina, not only address the issue of Sears demand for arbitration, but also cited many of the cases of Federal Courts and especially the Supreme Court of United States in the matter of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 131 L.Ed.2d 985, 993, 115 S. Ct. 1920, 1924 (1995).

The Arizona Supreme Court, refused to agree with arbitration in several cases. See *Broemmer*, 173 Ariz. At 150, 840 P.2d at 1015. Similarly the Minnesota Supreme Court in *Gerdesmeier v. Sutherland* ***also refused to enforce an arbitration provision.***

In *Lytle v. Citi Financial Services, Inc.*, 810 A.2d 643 (PA. Super. Ct. 2002) the court could not be any clearer by stating; *"unconscionability arises where one party 'reserves sole access to the courts.' The presumption can be rebutted by a showing of 'business realities' that compel the lack of mutuality."*

Only if this Court would have viewed all cases which were held by District Courts, Federal Court of Appeals, and the Supreme Court, the Court would have concluded differently. IN other instances, in *Myers v. MBNA*, at el. (00CV163-M-DWM (in D. Mont, March 2001), that Court also strike down MBNA's motion to compel arbitration, when Honorable Chief Judge Donald W. Molloy

found that the Arbitration Section can not be enforced, ad that no such agreement to arbitrate could be implied...

Surprisingly, this Court implies that it is impossible for MBNA to prove that it had sent the arbitration agreement. Moreover, this Court presume that Samadi has received or must prove that he did not receive the arbitration clause/agreement. Meanwhile other courts rely on fair assessment and evidences and conclude that the burden of proof is upon the party who claims that the action was taken. In reality, in a court of law where and when the complaint must prove as to the action in which it is claiming, this Court expects the opposing party to provide proof. In ***MBNA Bank v. DeWayne Flint*** (#03-CV168173) the Court held; *"so its' your (referring to MBNA) burden to prove that he agreed to participate to arbitration... Defendant says this is no evidence and rests, based on the evidence produced by the defendant and no evidence by the plaintiff, motion to confirm the arbitration is overruled."*

CONCLUSION

Yet leaving all these and many other arguments and holding of the Courts aside, it can not be any clear that Plaintiff's fundamental Constitutional Rights have been violated through the years and now this Court wishes to extent such abused into the arbitration without any evidence (even when the arbitration Agreement was not received and that would have been unfair to presume that it was.) **The issue herein is not only the fairness of the arbitration**, but also:

A. When a law is violated, is the punishment arbitrable? While speeding and being issued a citation, could the citation be arbitrated? If not, then how could the MBNA's violation of **FDCPA** and FCRA be arbitrable? In *Neilsen v. Dickerson*, the Court held; "*normally, it is debt collector which faces liability for wrongful conduct under the Fair Debt Collection Practices Act. In this case; however, it was the creditor which may be liable.*"

B. If arbitration was the issue, then why did MBNA sell that account instead of arbitrating?

C. If arbitration was the issue, why did MBNA not address the arbitration and proceeded with nine (9) months of litigation proceedings until a day before its was to release its response to Plaintiffs discovery and demanded arbitration?

D. Did the Court really resolve all issues of Plaintiffs Constitutional Rights. It is clear that the Court did not. The Court made much presumptions and research so that the conclusion would favor MBNA. In ***Brady v. US*** **US 742, 784 (1970) the U.S. Supreme Court held;"** ***Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."***

E. Plaintiff was to given the opportunity to cross examine or depose MBNA's only witness who tailored her Affidavit. It that a fair practice or assessment of any Courts proceedings?

As of January 05, 2005, the Federal Courts of California discontinued automatic assignment of cases to arbitration after reviewing many similar cases.

Most importantly, if Arbitration was a factor, MBNA would have been able to proceed with such process in matters where it previously litigated for each and every allegations of Plaintiffs complaint. However, cases such as *MBNA v. Flint*, *Myers v. MBNA*, *Broder v. MBNA*, *Pfenning v. Household and MBNA*, *Johnson v. MBNA* and many similar matters which MBNA litigated against its own cardholder, MBNA not only was not able to arbitrate nor successfully completed its litigation in Courts.

Therefore, and for the reasons stated above, the entry of such Report and Recommendation is fundamentally unfair and bias.

WHEREFORE, and for reasons and citations set forth herein, Plaintiffs present their objections to the Report and Recommendations of the Court and pray that the Court will dismiss the Arbitration issues. Plaintiffs further pray that the Court to grant,

A. This Motion to Strike Defendant's Affidavit and Exhibits submitted in support of Defendant's Motion to Compel;

B. Deny MBNA's Motion to Compel for Arbitration;

C. Deny MBNA's Motion to Stay Proceedings;

D. Order Defendant to present its responses to Plaintiff's interrogatory, production of documents, and admissions as soon as possible;

E. Grant Plaintiff's Motion for Injunctive Relief based on UDPA (Unfair Debt Practice Act) and FDCPA;

F. Grant other and further relief as the Court may deem just and proper.

Respectfully Submitted

_____

Mike H. Samadi, pro se
Plaintiff

4555 Bettys Branch Way
Evans, GA 30809
(706) 364-0555

APPENDIX 6.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MIKE H. SAMADI, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CV-104-137
	)	
MBNA AMERICA BANK, N.A.	)	
	)	
DEFENDANT.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pro se Plaintiffs[1] brought the captioned case alleging that Defendant MBNA America Bank, N.A. ("MBNA"), with whom they had a credit card, violated the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., the Fair Debt Collection Practice Act, 15 U.S.C. § 1692a, et seq., and the Truth in Lending Act, 15 U.S.C. § 1601, et seq. The matter is now before the Court on MBNA's Motions: 1) for protective order, 2) to compel arbitration, and 3) to stay these proceedings pending arbitration. (Doc. Nos. 17, 19). Plaintiff Mike H. Samadi ("Samadi") has filed a response (doc. no. 22) and on June 1, 2005, the Court heard oral argument on the matter. Samadi also now curiously requests "injunctive relief" and has asked the Court to "strike Defendant's Affidavit and Exhibits." (Doc. nos. 23, 25). Upon consideration, the Court resolves the matter as follows.

I. BACKGROUND

A. The Legal Issue

First, it should be noted that the instant case presents many of

[1] Plaintiff paid the filing fee.

the typical problems in *pro se* litigation. First, although it is clear that Samadi[2] has done a significant amount of legal research, he has been unable to set forth "a short and plain statement of the claim showing that [he] is entitled to relief," in his complaint or to address the substantive issues raised by MBNA's motion to compel arbitration. Fed. R. Civ. P. 8. The Court is thus put in the unenviable position of handling a case in which few things are clear and the Court is largely forced to frame the issues without help from the parties. Nevertheless, it is clear that the parties have a dispute- a dispute MBNA asserts is arbitrable.

MBNA cites an arbitration clause, to which Samadi is allegedly bound, which states that "any claim or dispute arising from or relating in any way to this [Credit Card} agreement or any prior

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[2] Since his motion to be added as a party plaintiff in this case, the Court has not heard from Samadi's co-plaintiff in this case, Mr. Johnny Hollis, Jr. ("Hollis"). Hollis's only apparent involvement in this case is that he claims he is an "additional cardholder" or a "secondary account holder." 9Doc. no. 5, pp.1-2). For ease of reference, the Court will refer to Samadi whether referring to him individually or to Plaintiffs collectively.

[3]The Court also briefly notes that the matter of the clause's retroactive application (if enforced) is of no moment. See Merrill Lynch, Inc. v. King, 804 F. Supp. 1512, 1514 (M.D. Fla 1992) ("Defendant's contention that part of the transaction occurred prior to execution of this agreement is of consequence. To being, the arbitration agreement states that it applies to all transaction whether entered into prior, on, or subsequent to the date hereof. Moreover, an arbitration agreement may be applied retroactively to transactions which occurred prior to execution of the arbitration agreement." (citation and quotation omitted)); see also Belke v. Merrill Lynch, 693 F. 2d 1023, 1028 (11th Cir. 1982), *overruled on other grounds by* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) ("[A]ppellee argues that because certain acts complained of occurred prior to execution of the arbitration agreement those claims are not properly disposed of by submission to an arbitrator. Again, we disagree. By its own terms the contract between the parties covers not only disputes arising out of the agreement, but in the disjunctive includes 'any controversy between us arising *out of your business*.' (emphasis supplied). An arbitration clause covering disputes arising out of the contract or business between the parties evinces a clear intent to cover more than just those matter set forth in the contract.").

Agreement or your account" between MBNA and Samadi, "whether under a statute, in contract, tort, or otherwise.... Shall be resolved by binding arbitration." Def.'s Ex. 2, p.1 (attached at doc. no.. 17, pp. 17-18). The clause also states that claims "regarding the applicability" of the clause are also subject to arbitration. Id. Thus, the plain language of the clause gives it far-reaching (and retroactive) application to virtually any dispute between Samadi and MBNA, provided of course that the clause is enforceable.[3] See Andres v. Hometown Mortgage Services, Inc., 346 F. 3d 1024 (11th Cir. 2003) ("The agreement could not have been broader. Any disputes, because 'any' means all. And so, of course, does the word 'all'
itself. The agreement reaches this dispute because the agreement reaches any and all disputes." (citation and quotation omitted)). In assessing the enforceability of the clause, the Court beings by setting the relevant facts.

B. Relevant Facts

MBNA, a Delaware bank, issued a credit card to Samadi in 1996. Simpkins Aff., p. 2 (attached at doc. no. 17, pp.4-8)[4]; see also doc. no.1, p2. Samadi's account and use of the credit card were governed by a "Credit card Agreement" ("the Agreement"). The Agreement, among other things, provides that: 1) use of credit card constitutes assent to the terms of the Agreement; 2) MBNA may amend the Agreement by "complying with the applicable notification requirements of federal law and the laws of the state of Delaware, without regards to its conflicts of laws principles, and by any applicable federal laws."[5] Def.'s Ex. 1, pp. 1,6,8 (attached at doc. no, 17, pp. 9-16). Samadi never signed this Agreement, but he used the MBNA card from 1996 until at least 2002. (See, e.g., doc. no.1, p. 58).

In December 1999, MBNA mailed its cardholders an amendment to the Agreement via the United States Postal Service.[6]

In support of the instant motions, MBNA has submitted the affidavit of Margaret Simpkins, a Vice President at MBNA and custodian of records.

Perhaps also of note, the Agreement contains a forum selection clause which dictates that "any litigation" regarding the account or the Agreement must be brought in Delaware state court. Def.'s Ex. 1, P.8.

MBNA actually contracted with a third part to carry out the mass mailing. Simpkins Aff., pp.4-5

Simpkins Aff., p. 2. The Amendment contained the arbitration clause discussed above. When MBNA sent its cardholder notice of Amendment, it informed them that they could opt out of the arbitration clause if they so chose by sending written notification to MBNA. Id. at 3; Def.'s Ex. 2, P. 2. Samadi never opted out of the arbitration provision; however, he maintained that he never received the amendment and thus had no actual notice of the arbitration clause. (Doc. no. 22). On the other hand, MBNA asserts that it used Samadi's correct address, and that during 1999 and 2000 none of its mail to Samadi was returned as undeliverable. Simpkins Aff.,.p.4. Thus, MBNA asserts that the arbitration clause governs this dispute, and that Samadi received legally adequate notice of the amendment. For the following reasons, the Court agrees.

II. DISCUSSION

A. What Law Governs?

1. Applicable Federal Law

As a general matter, federal law requires this Court to enforce arbitration agreements. Section 2 of the Federal Arbitration Act ("the Act") provides:

> A written provision is … a contact evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9U.S.C. § 2. The Supreme Court has further clarified that "any doubts concerning the scope of arbitration issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself, or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp. 460 U.S. 1, 24-25 (1983).

That having been established, the purpose of the Act is to put arbitration agreements on equal footing with ordinary contracts. Jenkins v. First American Cash Advance of Georgia, LLC, 400 F. 3d 868, 874 (11th Cir. 2005) (quoting Gilmer v. Interstate/Johnson Lane

Corp., 500 U,S. 20, 24 (1991)). The Act applies to all arbitration agreements concerning transactions that involved interstate commerce. Id.. Thus, the Act clearly applies here, where the dispute involves a credit agreement between a Georgia resident and a Delaware bank. Id. at 874-75. Under the Act, state law governing "contracts generally and not arbitration agreements specifically" should be applied. Id. at 875 (quoting Bess v. Check Express, 294 F.3d 1298, 1306 (11th Cir. 2020)). Thus, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements." Id. (quoting Doctor's assoc., Inc. v. Casarrotto, 517 U.S. 681, 687 (1996)). Accordingly, the Court must determine whether Georgia or Delaware contract law should be applied.

Applicable State Law

The Agreement provides that it is governed by Delaware law. Def.'s Ex. 1, p.8. This Court applies Georgia choice of law and conflict of rules in determining whether to give such a provision effect. See Keener v. Convergys Corp., 342 F. 3d 1264, 1267-1268 (11th Cir. 2003); Rayle Tech. Inc. v. DeKalb Swine Breeders, Inc., 133 F.3d 1405, 1409-10 (11th Cir. 1998). Giving that MBNA is a Delaware bank, with its principal place of business located in that State, there is no reason to suppose that the choice of law provision is unreasonable.[7] Generally speaking, Georgia courts enforce choice of law provisions unless they are contrary to public policy. See nationwide logistics Inc. v. Condor Transport, Inc., 270 Ga. App. 277, 280, 606 S.E.2d 319, 322 (2004). Samadi has outlined no public policy of the State of Georgia which would be contravened by giving the choice of law provision full effect, and the Court is aware of none.[8] Thus, the Choice of law clause should be given effect. Accordingly, the Court will apply Delaware law.

B. The Clause is enforceable and Samadi Received Adequate Notice.

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[7].In addition, as noted, the Agreement specifically provides, "This Agreement is made in Delaware." Def.'s Ex. 1, p. 8.

[8].Georgia courts have specifically explained that arbitration "is not in violation of the public policy of this State." Results Oriented, Inc. v. Crawford, 245 Ga. App. 432, 437, 538 S.E.2d 73, 78 (2000).

Under Delaware law, it is clear that arbitration should be compelled. A Delawre court has already applied Delaware law to conclude that the instant arbitration clause is enforceable, and that MBNA's mass mailing of the amendment to the Agreement constituted adequate notice. See Edlist v. MBNA America Bank, 790 A.2d 1249, 1257-60 (Del. Supr. Ct. 2001); see also Mackey v. MBNA, 343 F. Supp. 2d 966, 970 (W.D. Wash. 2004) (relying on Edelist to conclude that arbitration clause is enforceable). The Court sees no need to repeat the Edelist court's analysis at length herein.

Nevertheless, the Court will briefly address Samadi's notice argument. As a general matter, "a letter properly addressed, stamped, and mailed may be presumed to have been received by the addressee." Marsh v. First USA Bank, N.A., 103 F.Supp.2d 909, 918 (N.D. Tex.2000); see also Konst v. Florida East Coast Railroad Co., 71 F.3d 850, 851 (11th Cir. 1996) (describing presumption of receipt). Samadi's bald assertion that he did not receive notice is insufficient to rebut this presumption. See In re Hobbs, 141 B.R. 466, 468 (N.D. Ga. 1992) (mere denial of receipt insufficient to rebut presumption). In effect, Samadi's argument on this point amounts to a demand that MBNA "prove with certainly" that he received notice; however, "[s]uch burden of proof is not the law, for it would be virtually impossible in this era of mass-mailing to prove that any singular item of correspondence was in fact mailed." Marsh, 103 F.Supp.2d at 918 (Citation omitted).

At issue is simply whether MBNA has offered proof that it mailed the arbitration notice to its cardholders. Id. at 918. MBNA has furnished such proof. See Simpkins Aff, pp. 2-5 (describing mass mailing of arbitration amendment). The Court is aware that Samadi has moved to strike MBNA's Affidavit and exhibits" in support of its motion to compel arbitration. (Doc. no. 25). That having been noted, this motion presented no legally cognizable reason to strike MBNA's proffered documents (and the Court itself is aware of no reason to do so). Accordingly, Samadi's motion to strike should be summarily denied. In sum, Samadi received legally adequate notice of the arbitration amendment and his fair to out-out or to stop using his credit card constituted acquiescence to its terms. Accordingly, it is appropriate to compel arbitration, however, as the arbitration clause at issue covers *any* dispute between the parties, the Court is not persuaded that stay of the proceedings is appropriate.[9]

Rather, dismissal of the case is appropriate "if the Court concludes that all of the claims presented are subject to arbitration." Marsh, 103F. Supp. 2d at 926 (Citing Alford v. Dean Witter Reynolds, Inc.,975 F.2d 1161, 1164(5th Cir. 1992)). Indeed "to maintain jurisdiction under such circumstances will serve no useful purpose." Marsh 103 F.Supp.2d at 926; see also Caley v. Gulfstream Aerospace Corp. 333. Supp.2d 1367, 1379 (N.D. Ga. 2004) (dismissal appropriate were all claims submitted to court are subject to arbitration); Clayton v. Woodmen of the World Life Ins. Soc., 981 F. Supp. 1447, 1451 (M.D. Ala. 1997) (same). As any dispute between Samadi and MBNA regarding the credit account or the agreement is subject to the arbitration clause, dismissal is appropriate.

Nevertheless, the Court notes that dismissal with prejudice would be inappropriate, as in the event that an "arbitrator subsequently decide[s] that one or more of [Samadi's claims against [MBNA] [are] not arbitrable, [Samadi] would effectively be deprived of legal recourse, a most unjust result." Frank v. American General Finance, Inc. 23F.Supp.2d 1346, 1351 n.3 (S.D. Ala. 1998). The Court will also briefly note that Samadi's cryptic motion for "injunctive relief" (doc. no. 23) is made moot by the compulsion of arbitration, as it MBNA's request for a protective order (doc. no 19).[10]

III. CONCLUSION

For the foregoing reasons, the Court **REPORTS** and **RECOMMENDS** that MBNA's motion to compel arbitration and to stay these proceedings (doc. no. 17) be **GRANTED IN PART** and **DENIED IN PART** and that the instant case be **DISMISSED** without prejudice. The Court also **REPORTS** and **RECOMMENDS** that Samadi's motions for injunctive Relief and to Strike MBNA's "Affidavit and Exhibits" (doc. no. 23, 25) be **DENIED**. Finally, the Court **REPORTS** and **RECOMMENDS**

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[9]As noted, by its terms, the arbitration clause applies to *all* disputes between the parties, including "[c]laims regarding the applicability" of the arbitration clause. Def.'s Ex. 2, p.1.

[10]At any rate, the Court notes that Samadi has not explained just what relief he seeks or why he is entitled to it; rather, the motion seems chiefly aimed at Samadi's distaste for arbitration. (See generally, doc. no. 23).

that MBNA's motion for protective order doc. no. 19) be **DENIED** as **MOOT.**

SO REPORTED and RECOMMENDED this 10th day of June 2005, at Augusta Georgia.

s/ Honorable W. Leon Barfield

W. Leon Barfield
United States Magistrate Judge